

No. 89-5120-CSH
Status: GRANTED
CAPITAL CASE

Title: Michael Owen Perry, Petitioner
v.
Louisiana

Docketed:
July 10, 1989

Court: Supreme Court of Louisiana

Counsel for petitioner: Nordyke, Keith

Counsel for respondent: Salomon, Rene

Entry	Date	Note	Proceedings and Orders
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1	Jul 10 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 26 1989		Brief of respondent Louisiana in opposition filed.
4	Sep 28 1989		DISTRIBUTED. October 13, 1989
5	Feb 26 1990		REDISTRIBUTED. March 2, 1990
7	Mar 5 1990		Petition GRANTED. *****
9	Apr 9 1990		Order extending time to file brief of petitioner on the merits until May 4, 1990.
10	Apr 24 1990		Joint appendix filed.
11	May 7 1990		Order further extending time to file brief of petitioner on the merits until May 14, 1990.
12	May 14 1990		Brief amici curiae of American Psychiatric Association, et al. filed.
15	May 14 1990		Brief of petitioner Perry filed.
19	May 14 1990	G	Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as amicus curiae filed.
13	May 16 1990	G	Application (A89-814) by petitioner to file a brief on the merits in excess of page limits, submitted to Justice White.
14	May 17 1990		Application (A89-814) granted by Justice White, allowing a maximum of 60 pages.
16	May 25 1990	D	Motion of American Psychiatric Association, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
18	Jun 13 1990		Brief of respondent Louisiana filed.
17	Jun 18 1990		Motion of American Psychiatric Association, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
20	Jul 2 1990		CIRCULATED.
21	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 2, 1990. (4TH CASE)
22	Aug 30 1990		Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as amicus curiae GRANTED.
23	Sep 13 1990		Record filed.
24	Oct 2 1990	*	one vol., Supreme Court of LA
25	Oct 2 1990		ARGUED.
25	Oct 2 1990		Memorandum to come from petitioner.
26	Oct 4 1990		Memorandum and brief of petitioner requested at argument received and distributed

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89-5120

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,
PETITIONER,
VERSUS
STATE OF LOUISIANA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

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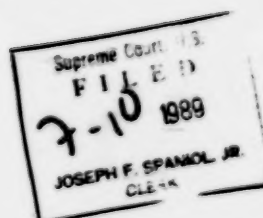
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QUESTIONS PRESENTED FOR REVIEW

ISSUES PRESENTED

- I. Do the Eighth and Fourteenth Amendments of the United States Constitution prohibit a State from forcibly injecting an insane death row inmate with mind-altering drugs when such drugs are not being used for treatment but are administered solely in an attempt to make him competent to be executed?
- II. Is it unconstitutionally cruel and unusual punishment to circumvent the Ford v. Wainwright, 477 U.S. 399 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986) prohibition of executing the insane by forcibly injecting the insane inmate with dangerous mind altering drugs in an attempt to make him sane, particularly when the Court's order imposes no limits whatsoever on these injections?
- III. What standard applies to determine whether a Louisiana inmate is competent to be executed?
- IV. Does that standard, the Eighth Amendment and Ford v. Wainwright, 477 U.S. 39, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986) prohibit the execution of a person who has been unanimously diagnosed as suffering from a major psychotic illness; whose sanity, even on medication, varies from moment to moment; and who varies "like a moving target" in his appreciation for the crime for which he was convicted and the punishment which he has been condemned to suffer?
- V. Is the Fourteenth Amendment violated when the Trial Court receives ex parte communications from the Department of Corrections and then relies upon these in reaching its decision to order forcible injections, without giving the defense notice or opportunity to be heard? Is it a denial of the right to counsel for the Court to have the inmate interviewed without counsel being notified or being allowed

to be present?

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IN THE
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OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

Petitioner, MICHAEL OWEN PERRY, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court filed May 12, 1989, and states:

CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming, on direct appeal, Petitioner's conviction and sentence of death may be found at 502 So.2d 543 (La. 1986) and is set out at pages 1-22 of the appendix.¹

The denial of petitioner's application for appeal or in the alternative writ of certiorari to the Louisiana Supreme Court on the question of forcible medication is published at _____ So. 2d _____ (La. 1989) and is set out at App. 23. The denial of petitioner's application for rehearing to the Louisiana Supreme Court is published at _____ So. 2d _____ (La. 1989) and is set out at App. 24.

The remaining orders and rulings raising the questions presented for review are not published and are set out at App. 25 - These include:

¹ Appendix citations shall be cited as "App. ____".

1. The order of the trial court letting a hearing on the issue of competency to be executed (App. 25).
2. The August 26, 1988 ruling of the trial court, overruling defendant's objection to the use of ex parte materials submitted to the Court by the Louisiana Department of Corrections (App. 26-29).
3. The Trial Court's order of August 31, 1988, ordering that weekly reports submitted to the Court by the Louisiana Department of Corrections be entered as evidence (App. 30).
4. The trial court's October 21, 1988 reasons for judgment implicitly finding Michael presently incompetent and ordering forcible medication to achieve competence (App. 31-61).
5. The Trial Court's October 21, 1988 judgment ordering forcible medication (App. 62).

JURISDICTIONAL STATEMENT

This application seeks review of a judgment of the Louisiana Supreme Court, entered May 12, 1989, denying petitioner's appeal and alternative application for writ of certiorari. Petitioner's timely application for rehearing was denied June 16, 1989.

The statutory ground for jurisdiction of this Court lies in 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

the Sixth Amendment which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; ... and have the assistance of counsel for his defence.

the Fourteenth Amendment which provides in relevant part:

...[N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor

deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Louisiana statutes which are set out in the Appendix:

1. La. R.S. 28:171 at App. 63-65
2. La. R.S. 15:830 at App. 65
3. La. R.S. 15:830.1 at App. 65
4. La. Code Crim. P. Art. 641 at App. 66
5. La. Code Crim. P. Art. 647 at App. 66
6. La. Code Crim. P. Art. 648 at App. 66-67

STATEMENT OF THE CASE

A. Statement of Facts

Michael Perry was convicted of five counts of first degree murder including the deaths of his mother and father. The conviction and sentence are not at issue in this application except as they may relate to the issue of sanity and competency to be executed.

Michael has an extensive history of mental illness and was found incompetent to proceed to trial several times. He was committed to Feliciana Forensic Facility, an institution for the criminally insane. Prior to this offense, Michael had a history of civil commitments to Central Louisiana State Hospital. No issue of malingering exists as all four doctors testified that they believed Michael to be genuinely ill and the Trial Court ruled that Michael has made a sufficient threshold showing that his competency is in doubt (Tr. 4/88 p. 5-6 App. 68-69).

The physicians who examined Michael for the competency hearing unanimously agreed that he is suffering from schizo-affective disorder, a major mental illness. One psychiatrist described schizoaffective disorder as:

Schizoaffective disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also has a problem with his feeling tone or the defective [sic - affective] component. When they are in the state of acute illness, they usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifest[] symptoms like not wanting to sleep, not wanting to talk of having crying adversity. The problem is also that they would have some distortion in their thinking....

As shown by the doctors' reports (App. 127-138) and testimony at the competency hearing in April, 1988, this disease manifests in Michael as psychosis, disordered and inconsistent thinking, and auditory hallucinations. Michael believes he is God, hears voices, is fixated on numbers, is paranoid and delusional. Dr. Aris Cox, a board-certified forensic psychiatrist who is Michael's treating psychiatrist at Louisiana State Penitentiary testified that "I

don't think I've ever seen Michael, even on medication, be completely coherent, well-integrated, rational."

B. Course of Prior Proceedings

Michael Perry was convicted of first degree murder and sentenced to death in 1985. In affirming Michael's conviction and sentence (State v. Perry 502 So. 2d 543 (La. 1986)), the Louisiana Supreme Court reiterated Louisiana's position that this State does not execute the insane (State v. Allen, 15 So. 2d 870 (La. 1943)) and questioned whether Michael was competent to be executed in light of this prohibition and Ford v. Wainwright 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed. 2d 355 (1986).

In January, 1988, the Trial Court on its own motion scheduled a hearing to determine Michael's competency. Three psychiatrists and a clinical psychologist were appointed and examined Michael.

A hearing was held on April 20, 1988. The purpose of that hearing as stated by the Court was:

"Just let me say, of course, the purpose of this hearing today is that under the Supreme Court decision in this case cited at 502 So. 2d 543, the Louisiana Supreme Court in 1986 said that the State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime....The Supreme Court then steered defense counsel to apply to the trial court for appointment of a sanity commission to make such a determination. And, of course, counsel has done that...."²

Tr. 4/88 hearing p. 5 App. 68.

Michael presented evidence consisting of: (1) testimony of the psychiatrists and psychologist (2) medical records from Central State Hospital, an out-patient mental health clinic, Feliciana Forensic, and Louisiana State Penitentiary (3) Michael's videotaped testimony.³ The State chose to present no evidence (Tr. 4/88 hearing p. 199 App. p. 108). Defendant's evidence was un rebutted.

²Counsel did not make such an application. The Trial Court raised the issue by issuing an order for counsel to appear. App. 25.

³Hearings were held on four separate days and are cited herein by date. For example, testimony given at the April, 1988 hearing is cited as "Tr. 4/88 p. ____". Extracts of the testimony are included in the Appendix.

Although all evidence was completed and one case submitted on April 20, the Court did not rule, asked for briefing, and set the ruling for May 26, 1988. The Court postponed the ruling date several times and finally set it for August 26, 1988.

In the interim between April 20 and August 26, the Court ex parte requested the State of Louisiana to provide weekly reports on Michael to the Court WITHOUT PRIOR NOTICE, WITHOUT CROSS-EXAMINATION, AND OVER DEFENSE OBJECTION.⁴

On August 26, 1988 the Court again did not rule on Michael's competence but it did make the following rulings (App. 26-30):

1. Michael's objection to consideration of the ex parte weekly reports was overruled.
2. These reports were filed into the record.
3. A prior order, appointing counsel as decision-maker for the incompetent Michael Perry, was revoked.⁵
4. Based on the ex parte weekly reports, the Court decided not to rule whether Michael was competent either to be executed or to proceed.
5. The Court scheduled a new hearing for September 30, 1988.
6. Dr. Cox and Dr. Jiminez were ordered to reexamine Michael and testify at the new hearing.
7. The Court ordered Michael TO BE FORCIBLY MEDICATED WITH PSYCHOTROPIC DRUGS BY THE STAFF OF LOUISIANA STATE PENITENTIARY UNTIL SEPTEMBER 30, 1988.

Counsel contemporaneously objected to all of these rulings and to the Court's failure to rule on the April evidence and noticed intention to take writs to the Louisiana Supreme Court (Tr.

⁴Michael's written objection to this uncross-examined, ex parte evidence is included in App 139.

⁵The motion requesting this appointment is contained in App 141. This motion was granted in January, 1988. When counsel first met Michael Perry, it was immediately obvious that Michael was insane. Michael was unable to assist counsel in the most basic decisions affecting his life. Evidence was presented to the Court explaining counsel's dilemma and this order resulted. Additionally, counsel contacted the Louisiana State Bar Association and requested guidance. Counsel was told that, while the Bar acknowledged counsel's obligations under Code of Professional Responsibility Rule 1.14, the Bar would not provide any assistance in applying this rule to Michael's predicament.

8/88 p. 8 App. 114). On August, 29, 1988 the Louisiana Supreme Court stayed the forcible medication ruling leaving the remainder of the writ application pending (App. 144).

On September 30, 1988 a hearing was held before the Trial Court. Over Mr. Perry's objection, testimony of Dr. Kay Kovac and Dr. Aris Cox was received. This hearing was then continued until October 21, 1988, at which time testimony was taken from Dr. Teresita Jiminez. Following this testimony, the Trial Court rendered the following judgment:

1. The Trial Court declared that "...Michael Owen Perry is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment" (Order, 10/21/88, App. 62.)
2. However, the Court added that "it is further obvious from the testimony that he is competent only while maintained on psychotropic medication in the form of Haldol." (Tr. 10/21/88 p. 44, App. 57.)
3. The Trial Court ordered Michael forcibly medicated, declaring that "...Louisiana's interest in the execution of that jury's verdict override[s] those rights of Mr. Perry [to refuse forcible treatment]" (Tr. 10/21/88 p. 43-44, App. 56-57.)

The Trial Court then stayed all action under this order and declined to sign a death warrant until "the [Louisiana] Supreme Court makes a ruling one way or the other." (Tr. 10/21/88 p. 47, App. 60). This stay has not been lifted and is still in effect. The Trial Court suggested that this order is an "appealable judgment" within the meaning of La. Code Crim. P. 912. Mr. Perry also noticed his intention to raise all previous issues via supervisory writs in the event the order was not appealable.

On May 12, 1989, the Louisiana Supreme Court denied the application for certiorari and denied an appeal (App. 23). An application for rehearing was timely filed but was denied by the Louisiana Supreme Court on June 16, 1989 (App. 24).

All constitutional issues raised in this application were specifically raised to the Trial Court and to the Louisiana Supreme Court. Contemporaneous objections were lodged to all rulings of the Trial Court (Tr. 8/88 p. 8 App. 28 objecting to consideration of ex parte evidence; Tr. 10/88 P. 44 App. 57 objecting to the Court's order of forced medication and to the Court's finding concerning competency).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

- I. THE EIGHTH AMENDMENT AND LOUISIANA LAW PROHIBIT THE EXECUTION OF THE INSANE. THE LOWER COURT'S ORDER THAT PETITIONER, AN INSANE INMATE, BE FORCIBLY MEDICATED WITH PSYCHOTROPIC DRUGS FOR AN INDEFINITE TIME IN AN ATTEMPT TO CREATE COMPETENCY AND IS CONTRARY TO FORD V. WAINWRIGHT, 477 U.S. 39 (1986).
- II. WHAT STANDARD APPLIES TO DETERMINE WHETHER A LOUISIANA INMATE IS COMPETENT TO BE EXECUTED?

A. EIGHTH AMENDMENT ANALYSIS/CONTEMPORARY STANDARDS

In Ford, supra, this Court prohibited the execution of one who has become insane since conviction. The original purpose of the April, 1988 hearing was to evaluate Michael in light of Ford and Louisiana's prohibition (per Allen, supra) against executions of the insane. However, when the Trial Court reopened the hearing and interjected the question of medication, the issue changed. The new issue which the Trial Court's ruling has created is:

Given that it is unconstitutional to execute the insane and given that Michael, in his unmedicated state, is insane, can the State of Louisiana forcibly medicate him with psychotropic drugs to try to achieve competency for execution?

This case thus presents a question which is based on Ford but goes beyond Ford: May a State, consistent with the Eighth Amendment, attempt to make an inmate, who is undeniably insane, sane through the use of drugs when those drugs are given solely for the purpose of execution, not for treatment?

The issue is res nova as applied to a capital defendant. Those

states which have considered similar issues have answered this question in the negative. Louisiana has answered this question in the affirmative. A conflict, therefore, exists as to a State's constitutional ability to forcibly drug prisoners.

Ford expressed the horror which is felt in confronting the prospect of executing someone who did not understand his fate. This Court found that this same horror was felt nationwide and listed in Footnote 2 thirty seven states which prohibit the execution of the insane. This Court concluded that this consensus reflected the "evolving standards of human decency" which are the benchmark of the Eighth Amendment and, by those standards, the Eighth Amendment must prohibit such executions:

...[T]he intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Ford, supra at 2602

This same analysis mandates the conclusion that forcible medication, as ordered by the Trial Court in Michael's case, is prohibited by the Eighth Amendment.

App. ___ contains a survey of state statutes providing for medication of inmates, their procedures for dealing with insane inmates, and the limitations imposed on forcible medication. All states which have the death penalty prohibit the execution of sentence when the defendant is incompetent. Of these states, one automatically commutes the sentence to life imprisonment. Thirty (30) states commit the defendant civilly for treatment.

Most states also impose limitations and conditions on the use of treatments that are drastic and intrusive. For example, at least twenty five (25) states prohibit forcible treatment absent a medical emergency or prohibit the use of treatment or medication for non-medical purposes. Thirteen (13) other states prohibit the use of extreme treatments, e.g., lobotomies. Psychotropic drugs have been classified as equally intrusive and extreme as lobotomies and electroshock surgery (Guardianship of Roe 421 N. E. 2d 40

(Mass. 1981)).

Louisiana has joined the majority of states in prohibiting the execution of the insane (Allen, supra; Perry, supra). Louisiana has also joined the majority of states in affording treatment to insane inmates and in imposing limits on the use of forced medication.

Louisiana's statutes on pre-trial competence state:

La. Code Crim. P. Art. 648A -
If the Court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution...for custody, care, and treatment as long as the lack of capacity continues.

Code Crim. P. Art 648B then deals with a situation where the person is found to be a danger to himself or others and is unlikely to regain competence in the foreseeable future. That section states:

...the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment.

The Louisiana Supreme Court has held (State v. Henson 351 So. 2d 1169 (La. 1977)) that these articles, although originally enacted to deal with incompetency prior to trial, apply equally to incompetency that arises after conviction.

Louisiana also has specific statutes dealing with inmates who become insane. La. R.S. 15:830 requires that, when an inmate becomes insane the "Secretary of the Department of Corrections shall initiate legal proceedings" to have him committed to the Department of Health and Human Resources. If an inmate refuses medication, La. R.S. 15:830.1 provides, again in mandatory terms, that the Department shall file a petition, the Court shall determine competence, and if incompetent shall commit the prisoner for treatment in accordance with civil commitment procedures. La. R.S. 15:830.1 states:

A. Whenever a mentally ill...inmate refuses treatment and any staff physician, staff psychiatrist or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days.... If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting

forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided....

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety Corrections that has been designated by the Department of Health and Human Resources and Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this section shall be in accord with all procedures required by law in the case of judicial commitment....

There are several key words in this statute. The first is the word "treatment". The only purpose for which forcible medication is permitted is to treat the inmate for his mental condition. Such medication is permitted only if the inmate poses a danger to himself or others.

The statute also specifies what the trial court is supposed to do - make a finding of competence or incompetence to refuse his medication. Non-consensual medication is permitted only upon a finding of incompetence.

Most significantly, section B and C mandate that the inmate be committed to a treatment facility in accordance with all procedures required by law for civil commitments. By adding this section, the Legislature made applicable to insane prisoners the provisions of the Mental Health Law contained in La. R.S. 28:1 et seq. This includes La. R.S. 28:171 which guarantees rights to all mental patients. Those rights include:

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility....

F. No patient confined by...judicial commitment...shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient.... Medication shall

not be used for nonmedical reasons such as punishment or for convenience of the staff.

These statutes, as well as comparable ones from other states, show a fundamental commitment to human dignity and a recognition that "even" the insane and "even" insane inmates are entitled to protection from non-consensual, intrusive, and potentially harmful "treatment" by the State. These statutes permit a State to override an individual's personal rights and dignity only when some higher value is at stake such as to prevent the inmate from harming himself or others.

On their face, these statutes do not expressly exclude inmates condemned to death. On their face, they apply to all inmates and all civilly committed persons. Of the thirty states that authorize civil commitment and treatment for an insane death row inmate, no state has expressly authorized the use of forcible medication to establish competency for execution.

Thus this case is not as "simple" as Ford where the "contemporary standards of human decency" were discernable in statutes and jurisprudence. The question presented by Michael's case is one of integrating and resolving the tension among expressed policies:

1. Louisiana authorizes executions and the State has an interest in seeing such a sentence carried out.
2. However, Louisiana and the majority of states prohibit executions of the insane.
3. Louisiana and the majority of states impose limits on the use of forcible and intrusive "treatment".

The unanswered question is how, under the Eighth Amendment, to integrate or balance the States' expressed prohibitions against intrusive treatment and against executions of the insane against the State's interest in carrying out a death sentence.

The Trial Court did not make such an analysis. It focused primarily on the death sentence and concluded that, whatever other policies there may be and whatever Michael's interests and rights, these were outweighed by the state's interest in carrying out

Michael's sentence (Tr. 10/88 p. 42-44 App. 55-56.). Under the Eighth Amendment, the state's interest is not the only focus. The question is whether what the state is attempting to do is so cruel and unusual, in light of standards of decency, that the State's power must be limited. The majority of states including Louisiana have expressed the policy that there must be limits on the use of extreme medical procedures even when those procedures are used under the supervision of a physician and for treatment purposes. That expression of the state's commitment to human dignity, even for inmates, must temper the State's interest in carrying out this death sentence. The unlimited and unfettered "prescription" of drugs to try to achieve sanity - i.e., to circumvent the constitutional prohibition against execution of the insane - is more offensive than such executions themselves. It too is unconstitutional.

B. PROPORTIONALITY

In Thompson v. Oklahoma, ____ U.S. ____, 108 S. Ct. 2687, 2698 (1988), this Court stated "Although judgments of Legislatures, juries and prosecutors weigh heavily in the balance, it is for [this Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on a particular defendant. The use of drugs in this case, given Michael's history, the scope of the Trial Court's ruling, and the testimony from the examining doctors, is degrading, arbitrary, cruel, unusual, excessive and, therefore, unconstitutional.

There is no doubt that Michael suffers from schizoaffective disorder (Tr. 10/88 hearing p. 38, 145 App. 51.) This condition is incurable (Tr. 4/88 p. 55, App. 76). All that psychotropic drugs do is abate some of the symptoms so Michael appears more normal and so he can mouth the words necessary to "pass" whatever

test of insanity may be applied.⁶ But how reliable is this "mouthing of the right words" especially when the answers change from day-to-day or minute-to-minute as in Michael's case?

One of the characteristics of Michael's disease is inconsistency in thinking, or "ambivalence".

A. (From Dr. Jiminez) He was not consistent in the information that he gave me. He went from thinking he did not--from saying he did not do the act to saying that he did it out of anger.

Q. Okay, so we can add to that that he's also inconsistent in statements that he gives to you, right?

A. Yes sir, very ambivalent about things. (Tr. 4/88 hearing p. 21 App 70)

...

Q. Now when we say he understood his sentence, the death penalty, how were you able to conclude that he understood it? What component of it did he understand? What was it you explained or did he ask questions of you?

A. (From Dr. Jiminez) The first thing Mr. Perry said to me when I went to see him was, uh, I asked him if he remembered me and he said he did. And I said, do you know why I am here. And he said to me, you are here to help me stay alive, is what he said to me. And I said, why do you say that. And so we started talking about what his present condition and about what he had done that ended up in his incarceration and the penalty that he had. So that's when he first told me that he did not kill the family, that somebody else killed them, in fact, that man that killed them also had taken a shot at him in the head. Then at the later part of the interview that's when he said at the end that he was very angry with his mother and called her all kinds of names. And he said that the little boy was also a bastard and that his sister was insane. He started being derogative towards the family and stated that he did kill them. So he does understand that he killed them and that he is scared to die. So I say yes to those last questions that you asked. My apprehension with him is he does get ambivalent and he know--he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness. (Tr. 4/88 hearing p. 35-36 App 73-73).

Dr. Cox found the same inconsistencies.

Q. And on each occasion do you take the opportunity to discuss his charges, his fate, the penalty he faces?

A. (From Dr. Cox) Yes, sir, I attempt to.

Q. Okay. And have you succeeded in bringing up those

⁶When Dr. Jiminez saw him in September, the question posed to Michael was: "And, again I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him....".

subjects in each of your visits?

A. Sometimes I have and sometimes I haven't. As I indicated the first of March when I saw him I was able to and we had a very good discussion about it. There have been times when I've not been so successful.

Q. All right. And why were you prevented from being successful in your discussion with him?

A. Because I thought he was--my answer to that is when I was unable to do so he was so out of contact with what was going on that he really wasn't able to answer the questions. He would tell me things like he was God and he couldn't be killed.

Q. And that's a symptom of, in your opinion...

A. In my opinion, in his case, it's a delusion which is a symptom of his illness. (Tr. 4/88 hearing p. 72 App 84).

And so did Dr. Vincent:

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

Q. Did he acknowledge that he committed these murders to you or did he deny it?

A. He did both. At one point he said that he committed the murders. We talked about that briefly. Two minutes later I was asking another question and he said that he felt that he could be found innocent because he was in Washington, D.C. at the time.... He was very inconsistent. (Tr. 4/88 hearing p. 129-130 App. 91-92).

And of course there is Michael's "testimony":⁷

Q. Michael, what is your name, please?

A. Perry, Michael Owen, God--I was God when I was seven years old. I remember that. And I'm innocent, I didn't do it. (Tr. 4/88 hearing p. 168 App. 101)

...

Q. Michael, if they put God in the electric chair what's going to happen?

A. You'd kill me dead, I mean in twenty years that's the last report, you know. I mean I did ninety percent,

⁷Michael's insanity causes rambling incoherence and pressured speech. Because of difficulty in transcribing this testimony and capturing on the record the emotional changes and body language accompanying Michael's testimony, the Trial Court granted permission to videotape Michael's testimony to preserve it for appellate review.

you know, but I believe he's God, you know. I mean he knows the man and, uh, I don't like to cry and I told you I wouldn't try to cry but, uh, I mean that's how I made it first, you know. And, uh, I love my wife, you know, and I don't want to lose her, and I don't want to lose ya'll because ya'll the first ones that helped me. And I didn't do it what ya'll trying to say that I did it. I am crazy, nine percent, I go with that, that's for the money, you know. (Tr. 4/88 hearing p. 169-170 App. 102-103.)

...

A. ...So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question.

Q. If I paid you twenty million dollars you'd tell me who committed the murders?

A. Yes, sir, I would tell you ninety-million dollars. (Tr. 4/88 hearing p. 173-4 App 104-105).

...

Q. (By the Court) And you understand that the jury found you guilty? Or do you understand that the jury found you guilty of committing those five murders?

A. But they want me to pay the price.

Q. Do you know that the jury found you guilty of committing those five murders?

A. I didn't know that. They told me innocent.... (Tr. 4/88 hearing p. 177-178 App 106-107).

Which version is "the truth"? What, if anything, does Michael really understand about the crime, his conviction, or sentence? What the doctors' testimony and Michael's statements demonstrate is that Michael's comprehension of what happened and of his plight changes minute to minute. Is that "competence", "understanding"?

Dr. Cox, who has the most complete, recent knowledge of Michael's condition (Tr. 4/88 hearing p. 58 App 79) describes him as a "moving target".

Q. Is schizoaffective disorder something of which he can be cured?

A. No, sir.

Q. It's like diabetes, it's always going to be with him to a greater or lesser degree?

A. In my opinion, yes. It's something that can be managed like diabetes and sometimes it will be worse or sometimes it will be better but it's going to be there.

⁸ Michael has never been married however has the delusion that he married a Susan Annette Bordelon when he was seven years old. The theme of numbers, specifically 7 and 90 appear throughout Michael's testimony.

Q. And there's no way to predict when he will become psychotic even when he's on medication?

A. It's hard to predict with a hundred percent accuracy.

Q. Doctor, out in the hall, you indicated that Michael was, quote, a moving target. Would you explain to the Court what you meant by that?

A. I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent.⁹ He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not.... (Tr. 4/88 p. 58-59 App 79-80).

This Court has repeatedly stated that the death penalty is different. The proof required to impose the ultimate penalty must be strong and reliable (Woodson v. North Carolina 428 U.S.280 (1976); Gardner v. Florida 430 U.S. 349 (1977)). That penalty cannot be imposed in an arbitrary and capricious fashion (Furman v. Georgia 408 U.S.238 (1972)). So how is Michael's execution to be carried out? Can the state wait until a "good day" and execute Michael? Can Michael be executed if his "good days" outnumber his "bad days" by some amount? What amount? And what happens if the date set by the death warrant is a "bad day"?

In Ford, this Court stopped the execution of an inmate who became insane subsequent to his conviction but did not establish a mandatory standard for defining insanity. Justice Powell's concurrence suggested that "the Eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it (p. 2609)" and that "States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum" (p. 2608).

It is respectfully submitted that the Louisiana standards to determine competency to be executed are indeed more stringent than

⁹Two days later when Dr. Vincent saw him he was floridly psychotic (Tr. 4/88 p. 100 App 89).

those enunciated by Justice Powell.¹⁰ However, the Trial Court in Michael's case did not apply the Louisiana standard; the Trial Court used a standard similar to Justice Powell's concurrence which is not Louisiana law or constitutionally required. Accordingly, the Trial Court erred when it failed to take into account the guiding principles of the Louisiana statutory scheme and jurisprudence.

Louisiana Code Crim P. Art. 641 states:

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Since State v. Allen 15 So. 2d 870 (La. 1943), the Louisiana Supreme Court has applied this statutory scheme in the context of post-trial competence to be executed. In short, Allen extends by analogy the competency to stand trial articles to post-conviction situations.¹¹ In Allen, the Louisiana Supreme Court found that before a defendant will be executed, competency must be demonstrated, "[F]or the same reason that a person is entitled to a hearing before a conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of procedure govern" (Allen, supra at 871).

In Perry, supra, the Louisiana Supreme Court reapproved the application of Allen to post-conviction determinations of competency to be executed. The Perry decision affirms Allen. Perry also clarifies the burden of proof in a proceeding to determine competency to be executed:

1. A defendant bears the burden to prove present insanity, citing Allen with approval;

¹⁰See 47 La. L. Rev. 1351, 1359 and 1364 and FN 62 (1987) supporting the position that Louisiana provides greater substantive and procedural safeguards than Ford.

¹¹Interestingly, however, the Trial court found that because of State v. Allen, supra and State v. Perry, supra, "therefore, procedurally, it appears we are governed by the Code of Criminal Procedure and, therefore, do have a set of statutes to work with". The error then committed by the Trial Court is its failure to apply La. Code Crim. P. Art. 641 to Michael's case as required by Allen.

2. A defendant proves present insanity by a preponderance of evidence; and
3. A defendant must show he lacks the "present capacity to undergo execution" Perry, supra at 564.

Since Perry's "present capacity to undergo execution" simply incorporates the standards for competency as set forth in the code articles on pre-trial competency, Louisiana cases interpreting those code articles define the test that should have been applied to Michael. The leading case interpreting these articles is State v. Bennett 345 So. 2d 1129 (La. 1977).

Under Bennett a condemned person must understand the nature of the proceedings against him, i.e., understand that he has been sentenced to death for his having committed the crime; and he must participate with an informed appreciation in the execution of that sentence. Lastly, he must be able to assist in his defense i.e., he must be able to provide meaningful assistance in the defense of his life. Michael Perry does not understand the nature of the proceedings against him and cannot currently assist counsel to proceed in any meaningful present or future representation regarding post-conviction relief.

To subject Perry's competence simply to the test stated in Justice Powell's concurrence derogates from what that concurrence stated - namely, that a State can provide greater protection. Louisiana jurisprudence and the Louisiana Constitution do provide greater protections. They just weren't accorded to Michael.

In fact what the Trial Court's October, 1988 order attempts to do is to circumvent Michael's present insanity by ordering forcible medication. But forced medication does not cure the random capriciousness and disorientation of Michael's thinking and behavior. Michael was on medication at the time he was examined by each of the doctors who testified at the April, 1988 hearing (Tr. 4/88 p. 23, 55, 100 App 71,77,79) yet each of them found him to be schizoaffective, paranoid, inconsistent and disordered in his thinking and understanding.

Indeed forced medication makes Michael's plight even more

offensive because what is being done here is an experiment to try to achieve some sort of competence. When questioned about the efficacy of medication in improving Michael's ambivalence, Dr. Jiminez stated:

Q. If I understand what you just told me, Dr. Jiminez, is that his ambivalence is what frightens you, that if he were less ambivalent that he might be more cooperative with the court personnel that are trying to save his life?

A. That's true.

Q. Is there medication that you're aware of that can eliminate ambivalence in personality?

A. No. It's the extent of the ambivalence that we are concerned about. And that is part of the illness in schizophrenia so I thought that maybe if he could become more stabilized that maybe there will be less ambivalence on his part.

Q. How are we to stabilize him when there are no medications that eliminate ambivalence?

A. Well, that's the problem.

Q. You have medication that you would suggest issuing, offering and having him ingest to eliminate ambivalence?

A. I really don't know that I would be able to eliminate it because it because--but you could probably try him on a bigger medication and give it to him consistently and then see if there would be a change or there would be some improvement. He had improved before. (Tr. 4/88 hearing p. 36-37, App 74-75 emphasis added)

Dr. Cox's personal observations also confirm that the outcome of medication is uncertain.

Q. Doctor, you've also, I believe, seen him when he's undergone this forced treatment, have you not?

A. Yes, sir.

Q. And even after the forced treatment and massive doses of Haldol and he's still sometimes floridly psychotic?

A. He gets better. In my mind I think I settled the issue, in fact, I know I settled the issue. He does respond to medication when he's given it and he gets better. How good he gets probably does leave something to be desired but he gets better.

Q. Better is a relative term, isn't it?

A. Yes.

Q. I think that's what's troubling me a little bit. Is there any way to qualify that?

A. I don't think I've seen Michael, even on medication, be completely coherent, well-integrated, rational. I've always felt in him there's areas of psychotic thinking there.

Q. Even on his best days?

A. Yes, sir, even when I see him on his best days.

Q. With the massive doses of medication?

A. Yes, sir (Tr. 4/88 hearing p. 63-64 App. 82-83)

Dr. Este also had doubts about medication.

Q. What treatment course do you recommend to make Mr. Perry competent and sane?

A. I don't feel prepared to recommend a course of treatment.

Q. Well, hypothesize for me. Would Haldol help?

A. Possibly. I'm not certain.

Q. Prolixin help?

A. It could help in some ways.

Q. Hypothesize. Any other medications could help?

A. There are others which could help.

Q. Like what?

A. A variety of neuroleptic antipsychotic drugs....

Q. And what would those neuroleptic psychotropic drugs do that would make him sane and competent? How do they work?

A. I don't know that they would make him sane and competent.

(Tr. 4/88 hearing p. 152-153 App 99-100). Emphasis added.

When Dr. Cox examined Michael prior to the September, 1988 hearing, Michael had been given an injection of Haldol (Tr. 9/88 p. 31 App. 123).¹² Four days later his condition was:

A. (By Dr. Cox) Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me he had been having hallucinations, voices, as he described it....His thought processes were disorganized. He indicated to me that he was still hallucinating. My conclusion was that he was getting worse, even on the medication. (Tr. 9/88 p. 32 App. 124). Emphasis added.

Similarly, the medical records from Louisiana State Penitentiary show that Michael has been repeatedly medicated. Yet he continues to decompensate into florid psychosis. For example,

¹²This injection was given after the Louisiana Supreme Court stayed forcible medication of Michael.

Michael was medicated every day from November 30, 1987 to January 11, 1988 (App. 150). Yet the medical records (App. 151-154) describe his condition during that time as follows:

11/30/87 -	disoriented, hallucinating, hyperactive, agitated, yelling, hallucinating.
12/1/87 -	remains delusional, medication increased
12/2/87 -	increased medication, delusion of being haunted, mafia pouring water on him
12/3/87 -	medicated, delusional, flight of ideas
12/4/87 -	delusional, he's "God"
12/5/87 -	threatening to kill with thunderbolt, confused, is "God"
12/10/87 -	delusions remain
12/23/87 -	continues to assert he is "God"
12/31/87 -	complains devil stabbing him with a fork, psychotic, schizoaffective, disoriented, delusional, not oriented, incoherent.
1/1/88 -	decompensated, delusional, confused, completely disoriented.
1/2/88 -	still not well oriented
1/4/88 -	still on medication, says he's in the hospital because of burning paper, poor judgment
1/5/88 -	is "God", silly, loose associations
1/6/88 -	increasing medication, elevated mood, no change

Under these circumstances, medicating Michael to achieve competence is nothing more than an experiment.

And what of Michael in the meantime? He has already demonstrated a history of side effects from psychotropic drugs. Dr. Jimenez described Michael as having a very poor tolerance for medication. The recognized side effects of psychotropic drugs include drooling, unsteady gait, Parkinsonian-type symptoms, tremors, restlessness, and convulsive muscle movements. Mental and emotional effects include a feeling of deadness inside, agitation, panic, inability to remember, reason and function." (Davis v. Hubbard 506 F. Supp. 915, 928 (N.D. Ohio, 1980)): Dr. Cox described it "kinda like being in a straight jacket". Dr. Cox testified that these effects are permanent and are the result of

organic brain damage caused by the drugs.

Thus what the Trial Court has ordered is that, despite all of this history and testimony, the Department of Corrections is to manipulate the frequency and intensity of the dosage over an indefinite period of time to try to achieve "competency" that will pass constitutional muster. What guidelines are placed on this manipulation, on the dosage, the frequency, or combination of drugs? How long will this last? Who or when can someone say this isn't going to work?

In the context of civilly committed mental patients, courts have found a variety of rights that are violated by forcible medication. Cases e.g., Rennie v. Klein 653 F. 2d 836, 844-5 (3rd Cir., 1981) and Davis v. Hubbard 506 F. Supp 815 (N. D. Ohio, 1980) recognize that psychotropic drugs affect the patient's thinking processes and ability to communicate. The procedure for administering these drugs, such as by forcible injection, implicates the traditional right to be free from bodily contact. The decision to take such drugs is the kind of decision which calls into play a person's constitutional right to make intimate decisions which fundamentally affect his interests.

The source of these rights is the First Amendment freedom of speech and expression, the Due Process right to be free from unwarranted governmental intervention, the liberty interests of the Fourteenth Amendment or the penumbral rights of privacy. The specific source of these rights has caused little concern for Courts; the right to be free from such medication is treated as so basic as to be beyond dispute:

But this Court need not rest the protection of a person's interest in being free to use his mind as he so desires on the First Amendment. It is enough to observe that "the power to control men's minds" is "wholly inconsistent" not only with the "philosophy of the first amendment but with virtually any concept of liberty". (Davis, supra at 933)

The fact that Michael has been convicted does not extinguish these rights. In Bell v. Wolfish 441 U.S. 520, 545, 90 S. Ct. 1861, 1877, 60 L. ed 2d 1 (1979); this Court stated:

We have held that convicted prisoners do not forfeit all

constitutional protections by reason of their conviction and confinement in prison... So for example our cases have held that sentenced prisoners enjoy freedom of speech and religion under the 1st and 14th amendment ...that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the 14th Amendment and that they may claim the protection of the due process clause to prevent additional deprivation of life, liberty or property without due process of law."

And in Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980) at page 1264:

A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

When faced with the question of forcible treatment of a convicted prisoner, Courts have again looked to the First and Fourteenth Amendments as well as the Eighth Amendment. In Bee v. Greaves 744 F. 2d 1387 (10th Cir. 1984) the court concluded that these same rights are implicated when a pretrial detainee is medicated. In addition the Court in Bee stated at page 1393:

The [United States Supreme] Court recently suggested yet another possible basis for a liberty interest in the instant case. In Youngberg v. Romeo 457 U.S. 307, 102 S. Ct. 2452, 73 L. ed 2d 28 (1982) the Court reaffirmed that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."... The Court stated that this interest survives criminal conviction and incarceration.... If incarcerated individuals retain a liberty interest in freedom from bodily restraints of the kind in Romeo then a fortiori they have a liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs.

In Large v. Superior Court 714 P. 2d 399 (Ariz., 1986), the Court found that the substantive Due Process Clause of the state constitution limited the use of forcible medication on a convicted prisoner. Louisiana too guarantees a right to due process (Article 1 Section 2), but it also guarantees a right to humane treatment (Article I Section 20), individual dignity (Article 1 Section 3), personal privacy (Article 1 Section 5), and expression (Article 1 Section 7).

In ordering Michael forcibly medicated, the Court did not separately analyze each of these rights. Rather the Court

concluded that, whatever Michael's interests may be, they are outweighed by the state's interest in carrying out his sentence (Tr. 10/88 p. 43 App. 56). This is wrong. Where has the State of Louisiana expressed this overriding interest? The Legislature has certainly not done so. The Legislature's expression is in La. R.S. 15:830 and the Code of Criminal Procedure Articles on incompetence, all of which mandate civil commitment, not execution. The Legislature's policy on medication is La. R.S. 28:171 and 15:830.1, which place limits on this use and do not authorize what the Court has done here.

Nor have Louisiana Courts not expressed such an interest. Allen and Perry, supra, say Louisiana does not execute the insane.

Even if such an interest had been expressed, the Trial Court has omitted a very important word - the word "legitimate". The State may want to execute Michael but it is not just any such desire that will override Michael's constitutional rights. The balancing state interest must be a legitimate interest. The state has no legitimate interest in executing an insane person. Executions of the insane are unconstitutional and the state has no legitimate interest in attempting to carry out an unconstitutional sentence. Such sentence is invalid and prohibited by the Eighth Amendment. Using a means, particularly one as drastic as forced psychotropic medication, to achieve something which is, from the outset, an illegitimate end does not justify the devastation that the Court has done to Michael's rights. Louisiana has imposed the death penalty on Michael but no statute authorizes the infliction of these mental and psychological torments to try and achieve that end. No one is pretending that this medication is for Michael's treatment or that the doctors are being asked to exercise professional medical judgment. The instruction from the Court is to medicate to achieve one end only - competence for execution.

Nor is there any legitimate interest that outweighs these rights and permits what the Trial Court has done here.¹³ In Bee supra and Large, supra the Court analyzed all of the alleged state interests put forth by the government and uniformly rejected them as sufficient to permit the type of forced medication ordered here. With regard to using drugs to establish competence, the Court stated at p. 1395:

With their potentially dangerous side effects, such drugs may not be administered lightly. Generally speaking, a decision to administer antipsychotics should be based on the legitimate treatment needs of the individual, in accordance with accepted medical practice. A state interest unrelated to the well being of the individual or those around him simply has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned.

Large states, as bluntly and succinctly as any case, the relationship between constitutional rights, state interests, forced medication, and the convicted prisoner:

The freedom of convicted and sentenced criminals is subordinated to the state's interest in enforcing the sentence. The state may do anything and everything reasonably necessary to the safe confinement of the prisoner. It may shackle, isolate or otherwise restrain him physically if necessary to prevent escape or injury. But its power with regard to such physical restraints is not unlimited. The same principle applies to the type

¹³The Court has actually undermined a legitimate state interest - namely that of preserving the ethical integrity of the medical community. Guardianship of Roe, supra. The State, as the licensing agency for physicians and psychologists, has an interest in encouraging these professionals to comply with ethical standards. Yet by ordering physicians to medicate Michael for execution, the Court has asked these professionals to act contrary to their ethical guidelines. The American Medical Association has established a standard prohibiting doctors from participating in an execution ("Judicial Council of the American Medical Association" Report A (1980)). The American Psychiatric Association has done the same ("Principles of Medical Ethics Applicable to Psychiatry" Section 1(4)). This dilemma is also discussed in "Medical Ethics and Competency to be Executed" 96 Yale L. J. 167 (1986)

Dr. Vincent and Dr. Cox clearly see an ethical dilemma in medicating Michael. As Dr. Cox stated:

Q. Could you be the treating physician for Mr. Perry?

A. No, sir.

Q. Why not?

A. Because it is incompatible with my sense of ethics to treat somebody so they can get better and be executed.

of chemical restraints under consideration here. The state may forcibly inject this prisoner with drugs carrying the potential for causing serious side effects in any emergency where such a procedure is necessary, just as it may shoot him if justified in an emergency. But no such emergency can be claimed here, for this prisoner has been medicated against his will for months. The state may similarly administer psychotropic drugs with their known and unknown dangerous properties to this prisoner for purposes of treatment if it is authorized by proper procedural regulations, and if the drug administration is approved by qualified medical judgment and is prescribed for valid medical reasons. Valid reasons include cure or control of the diagnosed mental disorder; they do not include chemicals to keep prisoners docile and manageable regardless of potential serious physical and emotional consequences. The legislature has the authority and power to provide for punishment and incarceration of criminals. It does not have and cannot give to the Department of Corrections the power to immobilize and warehouse prisoners by using chemicals with known adverse consequences, only to release them - possibly severely impaired - at the end of their sentences. Such an Orwellian result is not permitted by our state constitution.

Large, supra at 409

"Orwellian" is the perfect word to describe Michael's plight. The Trial Court's order of October, 1988 hearing was not an order to treat Michael pursuant to any medical recommendation or exercise of a physician's professional judgment. The order was to medicate him to try to create and maintain competence.¹⁴ The Department's medical staff was not directed to use its professional judgment to treat him as he would be treated were he a private patient or even an inmate not facing a death sentence.

The Department is simply to medicate Michael often enough, regularly enough, and strongly enough to try to get him competent to be executed. The order does not permit abatement of medication even if Michael develops side effects which may lead the physician, in the exercise of his professional judgment, to change or even terminate the medication. It is obvious that, under these circumstances, the medication ordered for Michael is not treatment; it is part of his punishment. To subject Michael to medical

¹⁴App. 62 "It is further ordered that defendant's competency is achieved through the use of antitropic or antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection."

experimentation to try to achieve some indeterminable level of synthetic competence not to cure him, or to treat him, or to allow to stand trial - but rather to get around the Eighth Amendment and execute him - is a horror which this Court should not permit.

Indeed what the Trial Court has done is to turn Ford and the Eighth Amendment against Michael. If Michael were not insane, the State may be able to execute him but would be limited by the Eighth Amendment in the mode of that execution. The State could not conduct medical experiments or inflict arbitrary and gratuitous suffering on him. But because Michael is insane, the State is now able to inject him with unlimited dosages of drugs, for an unlimited time. The State is not required by the Court's order to consider the judgment of professionals or to evaluate the side effects. No further hearings are scheduled to evaluate the results of this medication; the injections are to continue whether they work or not. For Michael, the Eighth Amendment no longer is a protection against cruel and unusual punishments; it has become a vehicle by which new punishments, not authorized by any statute, become permissible.

The State has simply gone too far in this case. The State's interest in carrying out this death sentence is not a legitimate justification for unlimited injections of drugs, the results of which are at best questionable. Nor is the State's interest sufficient justification for imposing the death sentence based on competence which is no more than a momentary "glimpse" of sanity or a mouthing of some sought-for words.

Ford and the Eighth Amendment require more than this. At the very least, the Eighth Amendment requires that the State be limited in the use of forcible medication, taking into consideration the amount of time a person can be subjected to such medication and the side effects on those drugs, all subject to periodic review by the Court.

If the medication appears to be effective, the inmate is entitled, particularly under Louisiana law, to an adversarial hearing with Due Process protections for re-evaluation of his

competency. The test of that competency must demonstrate something more than one lucid moment tucked away in months of incoherence and hallucinations.

And at some point, when the medication has proved ineffectual or the side effects serious, the State's right to carry out the execution must cease and the inmate given what he was entitled to at common law - a respite from the execution altogether.

Michael, therefore, prays that this writ be granted, that this Court reverse the Trial Court's order of unlimited, interminable druggings, and impose limits on the use of forcible medication.

II. THE PROCESS BY WHICH THE TRIAL COURT DETERMINED PETITIONER'S COMPETENCY VIOLATED DUE PROCESS IN THAT THE DECISION WAS BASED ON HEARSAY AND OPINION "EVIDENCE" SUBMITTED BY THE STATE EX PARTE TO THE JUDGE, WITHOUT CALLING THE "WITNESSES" AT ANY HEARING OR SUBJECTING TO CROSS EXAMINATION AND CONFRONTATION. AND WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD.

Ford v. Wainwright 106 S. Ct. 2595 (1986) was concerned not only with the Eighth Amendment's prohibition against executing the insane but also with the process by which competency is determined. Unlike Ford, however, the question in this case is not whether the State's statutory scheme is constitutionally defective. Rather, in this case, the Court failed to apply the State's statutory scheme and, in doing so, violated petitioner's Due Process rights.

Sometime after the April 20, 1988 hearing the Trial Court began ex parte communication with the State. Information was provided weekly to the trial court regarding Michael. This information was not made available to Counsel for Michael nor were they even made aware of the existence of the information or the communications. Counsel first became aware of the material when the State citing a "weekly report" in a brief to the Trial Court after the April, 1988 hearing.

Defense counsel filed a written motion (App. 139) objecting to the Court receiving or relying on any such communications, citing expressly Michael's right of cross-examination, confrontation, basic due process and Sixth Amendment concerns. Counsel also asked for a hearing on whether this communication should be considered.

No hearing was granted and on August 26, 1988 the Court denied the written motion and expressly stated that it relied upon and was considering these materials (Tr. 8/88 p.4-5 App. 110-111). The end result of the Court's reliance on the uncross-examined, unsworn hearsay and opinion was a "new" hearing set by the Court on September 30, 1988. No express ruling on Michael's competency has

been made from the "old" hearing.¹⁵

This ex parte communication includes not only communications with counsel but also isolated observations and commentary on Michael's condition by Department of Corrections personnel. These persons were never called to testify, been cross-examined or subjected to the basic rule of competency - the oath. These reports offer opinions even though the author has never been qualified as an expert and no factual foundation for the opinion was established. Additionally, some two months after the hearing when counsel learned of these communications, it was discovered that some of the correspondence was directly in obvious "question and answer" format relating to issues before the Court.

A few excerpts from these ex parte communications will show that the Trial Court erred in receiving these as evidence and that this error amounts to a denial of Due Process. One of these letters (App. 156) states that, although the author does not see Michael regularly, it is her "understanding" that he functions well when on his medication. This is obviously opinion based on hearsay and on an unknown and unknowable set of "facts."

¹⁵The Trial Court also erred by permitting Dr. Kay Kovac to testify at the September hearing. Dr. Kovac was called as a witness by the Court. It is not at all clear why Dr. Kovac was called. She is not a psychiatrist or psychologist; her background is in family practice medicine (Tr. 9/88 p. 9 App. 113). The State had never called or mentioned her as a witness nor was she a member of the original sanity commission appointed for the April hearing.

Dr. Kovac went to see Michael in her capacity as a physician (Tr. 8/88 p. 12 App. 115). Counsel for Michael was not present during this "talk" nor were they aware that such contact was to take place. She talked with Michael about taking his medication.

She then questioned Michael about the reasons for not taking his medication and offered her opinion (in spite of her lack of credentials) about Michael's condition (Tr. 9/88 p. 13, 16, 29 App. 116, 119, 122). She also testified about her opinion on the relationship between Michael's condition and medication (Tr. 9/88 p. 26-27 App. 120-121) even though she admittedly has had minimal contact with Michael (Tr. 9/88 p. 10 App. 114).

This testimony was obtained in violation of Michael's patient:physician (La. R.S. 15:476) and attorney:client privilege as protected by the Sixth Amendment. Dr. Kovac enticed Michael to talk to her, not by virtue of her status as an appointed examiner and member of the sanity commission, but under the appearance that she was a treating physician. Her testimony was neither cumulative nor harmless. The Court obviously relied on this testimony in its ruling (Tr. 10/88 p. 39-40 App. 52-53).

A second report (App. 157) poses three questions directly related to the issues before the court, namely Michael's condition on medication, his condition immediately after being removed from medication, and his condition after being off medication for an extended period. The answers consist of the author's impressions and opinion derived from a review of Michael's medical chart. The answers are not a factual synopsis from the chart. For example in answering the first question, the author states that "he appeared to be stabilized". Appears to whom? Based on what facts? Is this the author's personal observation, someone else's observation, or the author's paraphrase of the record? There is no indication that the author has ever personally seen the symptoms she reports, even assuming that she is qualified to be an expert on such symptoms.

To the contrary, the record "apparently" states that Michael is sometimes bizarre and suicidal but the author states that she has never seen any suicidal or homicidal gesture or any documentation that Michael ever attempted to carry out any threats.

Another excerpt consists of one day's nursing notes from Michael's hospital record at Louisiana State Penitentiary (App. 160). Michael is constantly being hospitalized because he decompensates. Why pick this one day? The answer is obvious - this was an attempt to convey the impression that Michael was rational. However, the testimony from the April, 1988 hearing shows that Michael is a "moving target". His contact with reality varies on a daily (or less) basis. This was not a fair attempt to keep the Judge continually updated on Michael's condition - it is a blatant attempt to pick and choose "evidence" most beneficial to the State, outside of the ability of defense counsel to challenge the evidence and demonstrate that this is not representative of Michael's condition.

The same is true of the last exhibit (App. 162) in which the author states that she "saw [Michael] while ...on the tier to see another inmate. He appears to be in fair remission". "Fair" as compared to what? What had she seen the day before, or week before - a decompensated, insane Michael? On what facts was this opinion

based - did she interview him, do diagnostic testing, or did the author just catch a glimpse of Michael as she walked down the hall? We will never know.

The purpose of cross-examination is to explore these questions so the trier of fact can determine what weight, if any, to give to the witness' testimony based on, for example, her expertise, knowledge of Michael, any biases of the witness' part, and the facts upon which her opinion is based. Michael was denied this opportunity because of the ex parte nature of these communications. As stated in Ford:

"[C]ross examination...is beyond any doubt the greatest legal engine ever invented for the discovery of the truth.... Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the basis for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent....The failure of the Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted."

Ford, supra at 2605.

The Court then noted (page 2605) that the reliability of the fact finding process is further called into question when the opinion is based on only a cursory examination of the inmate. In Michael's case, it cannot be said with any certainty that there was even a cursory examination - the best that can be said is that the author "saw him on the tier while going to see another inmate". That is far less than the examination accorded Ford.

The procedural defect in Michael's case is as egregious as the defect which led this Court to find Florida's procedure constitutionally inadequate. In Ford, defense counsel was not given an opportunity to present evidence and cross-examine the experts. In Michael's case, there was a hearing at which the State and defense questioned the members of the sanity commission. The

problem is that the Court's decision was not based on that evidence adduced at that hearing - the record was "supplemented" with these ex parte reports and those reports obviously influenced the Court's decision. The Court so stated. (Tr. 8/88 p. 4-5 App. 110-111).

This Court has said on at least three occasions that determinations of competence must comply with minimal due process, cross-examination and confrontation. In addition to Ford, the Court in Vitek, supra held that the transfer of an inmate for psychiatric treatment without adequate hearing and confrontation was unconstitutional. In Specht v. Patterson 386 U. S. 605, 87 S. Ct. 1209 (1967), the Court reversed where the trial judge relied on a psychiatrist report, without a hearing, in determining that defendant should be transferred to a mental hospital. The Court found that a procedure which considered hearsay evidence and denied cross-examination and confrontation violated due process.

The procedure used in Michael's case is not only contrary to these cases but is also contrary to Louisiana law. Regardless of what may be constitutionally required, Louisiana has enacted statutes which guarantee an adversarial proceeding when competence is at issue. Notice, hearing, confrontation and cross-examination are expressly made a part of the Code of Criminal Procedure Articles on sanity commissions (C. Cr. P. 647), and the statute on commitment of insane inmates (La. R.S. 15:830) and the statute on medication of inmates (La. R.S. 15:830.1). As stated in Justice White's and Justice O'Connor's separate opinion at p. 2611-2613:

As we explained in Hewitt v. Helms 459 U.S. 460, 103 S. Ct. 864, 74 L. ed 2d 675 (1983), "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the states."...With Justice Rehnquist I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency.... The relevant provision of the Florida code, however, provides that the Governor shall have the prisoner committed to a "Department of Corrections mental health treatment facility" if the prisoner "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him".... Our cases leave no doubt that where a statute indicates with "language of an unmistakable mandatory character" that state conduct injurious to an individual will not occur "absent specified substantive predicates", the statutes create an expectation protected by the Due Process Clause....

I conclude therefore that Florida law has created a protected expectation that no execution will be carried out while the prisoner lacks the "mental capacity to understand the nature of the death penalty and why it was imposed on him."

Like Florida, Louisiana has created an "expectation" that execution will not be carried out while the defendant is insane. That "expectation" has a long history in Louisiana law (State v. Allen, 15 So. 2d 870 (La. 1943) and cases cited therein). Louisiana has also created a process by which competency is to be evaluated, a process that purports to provide basic Due Process protections.

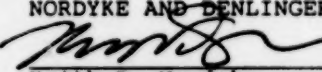
That process was not applied here. What is at issue is that the integrity of the factfinding process broke down. The procedure used by the Trial Court is not allowed by Louisiana law or by constitutional guidelines. These procedural and constitutional errors warrant the reversal of the Trial Court's decision. Counsel is literally litigating for Michael's life and it is grossly unfair to ask counsel and demand that Michael give up the right to a fair review that observes and respects normal statutory and procedural course. This error alone mandates reversal of this entire proceeding.

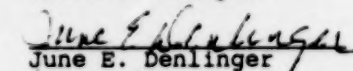
CONCLUSION

Michael Owen Perry is insane. Louisiana has said that it will not execute the insane. Standards of human decency embodied in the Eighth Amendment prohibit his execution. Yet Michael is being condemned not only to the death penalty but to the horror of forced, unbridled administration of drugs to try to circumvent these prohibitions. The process leading to the decision to drugged Michael failed to comply with the Due Process protections enacted by Louisiana and the decision is based on evidence obtained unconstitutionally. Michael prays that this Court grant this writ, reverse the ruling below, and prohibit the State of Louisiana from using forcible medication in an effort to establish competency.

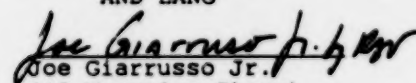
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SUPREME COURT OF THE UNITED STATES

NO. 89-5120

ORIGINAL

MICHAEL OWEN PERRY,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF RESPONDENT,
THE STATE OF LOUISIANA,
IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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ISSUES PRESENTED

- I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?
- II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that

once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its *parens patriae* and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.

The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral, expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ___ U.S. ___, 107 S.Ct. 2207, ___ L.Ed.2d ___, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989), ___ L.Ed.2d ___, (1989). In Penry this court held, in part, that the Eighth Amendment did not prohibit the execution of a

mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Penry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Penry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Penry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.¹ Any medication administered, has been only upon his physician's

1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.

order and directive, and administered only at regulated intervals.² While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).

a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.

ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off

antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.³

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford, citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. ___, 109 S.Ct. 2765, ___ L.Ed.2d ___ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).

status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

"It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

"It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipsychotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only

prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry abruptly removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Gooder" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating

psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side effects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. Ford illustrates the argument that mental illness per se is not a bar to imposing

the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Penry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Penry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right.

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's

writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Haldol medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Haldol treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J.J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, in view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of

achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).

The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce

insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)⁴

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Haldol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution,...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448, (Footnote No. 16; citation omitted).

4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, So.2d _____ (La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, So.2d _____ (La. 1989) (June 16, 1989) ruled against the petitioner.

Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in being free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,

445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in *Vitek* could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in *Montanye v. Haymes* 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye* 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent

death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. *Wolff v. McDonnell* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Haldol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Haldol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the

unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Haldol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Haldol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Haldol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that

Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming arguendo that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state its authority to medicate Perry against his will "upon a finding of incompetence."

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its parens patriae power to provide adequate medical care for its mentally ill citizens. At stake also was the state's police power to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. ~~One~~ need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a

"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's parens patrie power to administer, forcibly if necessary, antipsychotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972), citing from 3 W. Blackstone, Commentaries 47. Based on its parens patrie power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, *infra*, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:

"If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(I) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.

In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Perry and Stanford v. Kentucky, ___ U.S. ___, 109 S.Ct. 2969, ___ L.Ed.2d ___ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.

ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I

supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. ____ So.2d ____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d ____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve

competency to be executed.⁵

In view of the above givens and assumptions, the remaining questions are:

(1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?

and

(2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or

5. Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Perry v. Lynaugh. In Perry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.

antipsychotic drugs, including Haldol, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (R. pp. 43-44).

In view of the trial court's ruling on competency and accompanying order of treatment, we must necessarily address the questions of: (a) What procedural due process must accompany the inquiry into competency to be executed; (b) What procedural due process in fact accompanied the trial court's determination of Perry's competency to be executed; and (c) Did the trial court err in the conduct of the competency hearing?

(a) The procedural due process essence of Ford, which is designed to govern the inquiry into competency to be executed, requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker.

Initially, we must recognize that the Ford court addressed two issues. The first issue was whether there was an Eighth Amendment substantive right not to be executed while insane. A majority of the Court agreed on this issue. Second, there was the issue of what procedures must accompany the inquiry into sanity. This Court debated over the question. Justices Marshall, Powell, O'Connor and Rehnquist expressed differing opinions on the matter.

Louisiana commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning -- Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). There is no other evidence of consensus.

The State of Louisiana, suggests that procedural due process must satisfy basic fairness by providing the condemned with:

(1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard") (based on the expressions of seven justices, but for Justices Rehnquist and Burger);

(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and

(3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i) The privilege of assistance of counsel;

(ii) The privilege of compulsory process;

(iii) The right to present evidence on his behalf;

(iv) The opportunity to choose half of the members of the sanity commission which evaluated him;

(v) The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi) The privilege to participate in an adversarial hearing;

(vii) The privilege to testify as a witness and be videotaped for posterity;

(viii) The right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix) The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by any party or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410

F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for execution ... only while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.

The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the

stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illnessIbid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the

constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp. at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is

that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitous and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,

liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for ____ U.S. ____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication.⁶ The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

6. The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.

Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such requirements are unnecessary and unworkable. Without offering multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that it is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v. Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.

EAST BATON ROUGE PARISH
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day
of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: Rene Salomon
RENE SALOMON
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public,
this 26 day of September, 1989.

Henri Stuenkel
NOTARY PUBLIC

Defendant's motion for delegation of decision making authority	141
Louisiana Supreme Court stay order staying forcible medication (August 29, 1988)	144
Summary of State statutes regarding forced medication of inmates	145
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,
PETITIONER,
VERSUS
STATE OF LOUISIANA,
RESPONDENT.

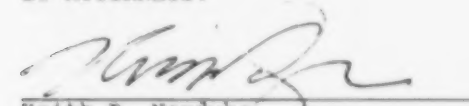
ENTRY OF APPEARANCE

NOW COMES Michael Owen Perry, petitioner and applicant for a writ of certiorari who enters the appearance of his counsel in this cause, all members in good standing of the bar of this Court.

Keith B. Nordyke
June E. Denlinger
NORDYKE AND DENLINGER
427 Mayflower Street
Baton Rouge, Louisiana 70802
Telephone: (504) 383-1601

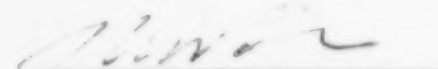
Joe Giarrusso, Jr.
McGLINCHEY, STAFFORD, MINTZ,
CELLINI AND LANG
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

BY ATTORNEYS:


Keith B. Nordyke

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing writ application to the United States Supreme Court has been mailed to the Honorable L. J. Hymel, Judge, and to Rene Solomon, Office of the Attorney General, and Annette Viator, Department of Public Safety and Corrections properly addressed and postage prepaid on this 10th day of July, 1989.


Keith B. Nordyke

SWORN TO AND SUBSCRIBED before me, Notary Public, this
10 day of July, 1989.


NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,
PETITIONER,
VERSUS
STATE OF LOUISIANA,
RESPONDENT.

RECEIVED

JUL 17 1989

OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO APPLY FOR PETITION OF WRIT OF CERTIORARI
IN FORMA PAUPERIS

I, Michael Owen Perry, being first duly sworn, depose and say that I am the petitioner, in the above entitled case; that in support of my motion to proceed on application for writ of certiorari without being required to prepay fees, costs or give security therefor; I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of processing the application are true.

1. Are you presently employed?

No. Since 1983 I have been incarcerated at Louisiana State Penitentiary, Angola, Louisiana and am currently on death row at said penitentiary.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No. I have an account at Louisiana State Penitentiary which currently is at \$0.00. On occasion the account has a few dollars for the commissary. I have no other money.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

6. I have not applied in any Court below for leave to proceed in forma pauperis although I intend to do so as necessary. To date, there has been no proceeding below requiring costs or prepayment of costs and the Courts below have treated my case as if I was in forma pauperis.

Mike Perry
MICHAEL OWEN PERRY

SUBSCRIBED AND SWORN TO before me this 27 day of

Joe, 1989.

[Signature]
NOTARY PUBLIC

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

89-5120

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NUMBER 89-

MICHAEL OWEN PERRY,

PETITIONER,

VERSUS

STATE OF LOUISIANA,

RESPONDENT.

MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES Michael Owen Perry, petitioner and applicant for writ of certiorari who moves leave of court to proceed in this cause without prepayment of fees and costs for reasons set forth herein and in the attached supporting affidavits:

1.

Mover has been confined on death row, Louisiana State Penitentiary for over two (2) years and has been incarcerated continuously since 1983.

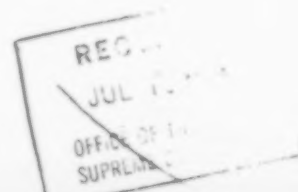
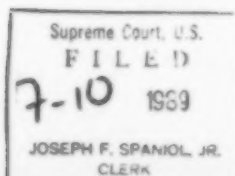
2.

Mover has no income, assets or means with which to pay costs as they may accrue.

WHEREFORE MOVER PRAYS that leave of court be granted for petitioner, Michael Owen Perry, to proceed in forma pauperis pursuant to Rule 46 of this Court.

BY ATTORNEYS:

Keith B. Nordyke
Keith B. Nordyke, Bar Roll 8556
NORDYKE AND DENLINGER
P. O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601



STATE v. PERRY

La. 543

Cite as 502 So.2d 543 (La. 1986)

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constitutionally obtained and to constitu-
tional grounds for the suppression of a
confession or statement of any nature
made by the defendant. Absent constitu-
tional implications, which is here the case,
article 703 is inapplicable by its very lan-
guage and does not support the use of a
motion to suppress attorney-client commu-
nications.

The majority deems it best to require
proof of the alleged conspiracy by a "pre-
ponderance of the evidence." I adhere to
the belief the state need only establish a
"prima facie" case of the underlying con-
spiracy in order to vitiate the attorney-
client privilege pending final resolution of
the merits of the claimed privilege. Our
brothers on the federal bench agree. *Unit-
ed States v. Dyer*, 722 F.2d 174, 177 (5th
Cir.1983), and cases cited therein. Ade-
quate safeguard is provided by the consti-
tutional constraint against being compelled
to give testimony against oneself.

In all other respects, I agree with the
majority.



STATE of Louisiana

v.

Michael Owen PERRY.

No. 86 KA 0460.

Supreme Court of Louisiana.

Nov. 24, 1986.

Rehearing Denied March 12, 1987.

Defendant was convicted in the Nine-
teenth Judicial District Court, East Baton
Rouge Parish, Cecil C. Cutrer, J. ad hoc, of
five counts of first-degree murder, and was
sentenced to death, and he appealed. The
Supreme Court, Cole, J., held that: (1) find-
ing defendant was competent to stand trial

was sufficiently supported by evidence; (2)
defendant was properly allowed to with-
draw dual plea and enter plea of not guilty;
(3) confession made to jailer was admissi-
ble; (4) confession made to aunt was admis-
sible; (5) statements made to officers while
being transported to facility for psychiatric
evaluation were admissible; (6) evidence
seized at two murder scenes was admissi-
ble; (7) photographs of murder scene were
admissible; (8) reference to defendant's
theft of radio was not reversible error; and
(9) death penalty was not excessive.

Convictions and sentence affirmed.

1. Mental Health ¶432

Defendant who lacks capacity to un-
derstand proceedings against him or to as-
sist counsel in preparing defense may not
be subjected to trial. LSA-Cr.P. art. 641.

2. Criminal Law ¶625

Defendant has burden of establishing
incapacity to stand trial as result of mental
disease or defects by clear preponderance
of the evidence, because state law pre-
sumes defendant is sane and responsible
for his actions. LSA-R.S. 15:432; LSA-C.
Cr.P. art. 641.

3. Criminal Law ¶494

Finding of homicide defendant's com-
petency to stand trial was sufficiently sup-
ported by expert psychiatric testimony that
defendant suffered from personality disor-
der or paranoid illness, though there were
also diagnoses by nonpsychiatrists that de-
fendant had more disabling thinking disor-
der of schizophrenia, where examining phy-
sicians were unanimous in their conclusion
that defendant was able to proceed with
trial.

4. Criminal Law ¶286

Trial court properly permitted homi-
cide defendant, over objection of his coun-
sel, to withdraw his dual plea of "not guilty
and not guilty by reason of insanity" and
enter single plea of "not guilty" following
finding of competency.

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5. Criminal Law §531(3)

Finding homicide defendant did not suffer from mental illness to degree necessary to result in exclusion of confession because of involuntariness was sufficiently supported by evidence that defendant was in contact with reality until he heard "trigger words" which were not part of conversation during confession, and confession given did not indicate rambling or jumping from subject to subject.

6. Criminal Law §517(6)

Testimony of homicide defendant's aunt, regarding confessions defendant made to her, was admissible where aunt was not acting as agent for sheriff and did not question defendant on two dates he gave unsolicited confessions.

7. Criminal Law §412(4)

Homicide defendant's statement regarding location of guns, made while being transported to facility for psychiatric evaluation, was admissible where accuracy of statement, which was borne out when police recovered guns from drainage canal which defendant suggested they search, showed defendant was in touch with reality when he made statements.

8. Criminal Law §412(1)

Homicide defendant's statement regarding location of guns, made while defendant was being transported to facility for psychiatric evaluation, was admissible, though it was only part of conversation which took place during trip, where defense counsel did not object to statement on that ground during direct examination of officer, and in any event, officer was questioned thoroughly about defendant's conversation and testified as to information in addition to that concerning location of guns. LSA-R.S. 15:450.

9. Searches and Seizures §173

Warrantless searches of home in which murders occurred were lawful consent searches where both surviving resident and caretaker consented to search when bodies were discovered and subsequent searches to collect evidence and remove items which required laboratory analysis.

10. Searches and Seizures §164

Murder defendant could not object to warrantless search of his parents' home, in which murders occurred, where defendant lived in trailer behind parents' home, was not permitted in parents' home without their permission, and had no property inside home. LSA-Const. Art. 1, § 5; U.S. C.A. Const.Amend. 4.

11. Criminal Law §438(5), 661

Homicide defendant cannot force State to use drawings or other evidence instead of photographs depicting victims and defendant cannot deprive State of moral force of its case by offering to stipulate as to what is shown in photographs.

12. Criminal Law §438(7)

Color photographs of homicide victims and crime scene were admissible, though gruesome, where any prejudice was outweighed by relevance and probative value of photographs in proving corpus delicti, helping to identify victims, corroborating cause of death, types of weapons used and location and severity of wounds.

13. Criminal Law §369.2(4)

Erroneous admission of state witness' oblique reference to homicide defendant's theft of radio was insignificant when weighed against five counts of first-degree murder for which defendant was on trial.

14. Homicide §354

Use of color photographs of murder victims to prove that murders were committed in especially heinous, atrocious or cruel manner, did not introduce arbitrary or prejudicial factor into sentencing sufficient to require death penalty to be set aside. LSA-Cr.P. art. 905.9; Sup.Ct. Rules, Rule 28 (C.Cr.P. Rule 905.9.1), 8 LSA-R.S.

15. Criminal Law §730(5)

Prosecutor's statement during sentencing phase that law required death sentence for persons convicted of first-degree murder was not reversible error where there was no objection and misstatement was

overcome by judge's subsequent instructions.

16. Homicide

Jury did not overlook alleged mitigating circumstances in recommending death penalty for first-degree murder where jurors received conflicting medical testimony on defendant's mental condition and chose to believe State's experts that defendant did not suffer mental disorder so overwhelming that he was insane or unable to control or understand his actions.

17. Homicide

Finding that murder defendant knowingly created risk of death or great bodily harm to more than one person, as aggravating circumstance in first-degree murder prosecution, was sufficiently supported by evidence that defendant killed five persons during single criminal episode.

18. Homicide

Death sentence was not disproportionate to penalty imposed in similar cases where defendant shot five members of his family to death in their homes.

19. Criminal

Defendant convicted of murder and sentenced to death would not be executed if court determined he had become insane subsequent to conviction and lacked capacity to understand death penalty. LSA-Cr.P. art. 642.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Rene Solomon, Steve Laiche, Asst. Attys. Gen., for plaintiff-appellee.

Robert Mark Romero, Welsh, Richard Arceneaux, Jennings, for defendant-appellant.

COLE, Justice *.

Michael Owen Perry was indicted on five counts of first degree murder, in violation of La.R.S. 14:30. After deliberation during the guilt phase of his trial, the twelve person jury unanimously concluded defendant was guilty as charged on all five counts.

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18. Homicide §354

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19. Criminal Law §981(1)

Defendant convicted of murder and sentenced to death would not be executed if court determined he had become insane subsequent to conviction and lacked capacity to understand death penalty. LSA-Cr.P. art. 642.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Rene Solomon, Steve Laiche, Asst. Attys. Gen., for plaintiff-appellee.

Robert Mark Romero, Welsh, Richard Arceneaux, Jennings, for defendant-appellant.

COLE, Justice *.

Michael Owen Perry was indicted on five counts of first degree murder, in violation of La.R.S. 14:30. After deliberation during the guilt phase of his trial, the twelve person jury unanimously concluded defendant was guilty as charged on all five counts.

* Pike Hall, Jr., Associate Justice pro tempore in place of Mr. Justice Lemmon.

Following the presentation of evidence during the sentencing portion of the trial, the jury unanimously recommended defendant be sentenced to death on each count. The jury found the same two aggravating circumstances existed for each crime: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious, or cruel manner. The trial judge subsequently imposed the death sentence.

Defendant on appeal relies on six assignments of error. The first three assignments of error concern statements made by defendant to various persons which the trial court ruled were admissible. Assignment of Error Number One contends the trial court erred in allowing the introduction of a statement given to Deputy Herbert L. Durkes, Jr. on September 15, 1983, while defendant was incarcerated at the Jefferson Davis Parish jail. In Assignment of Error Number Two, defendant argues the trial court should not have permitted the introduction of the testimony of his aunt, Zula Lyon, regarding statements defendant made to her. Assignment of Error Number Three involves the introduction of testimony of Deputy Ervin Trahan as it relates to a statement made by defendant while being transported by Trahan and Sheriff Dallas Cormier to the Feliciana Forensic Facility for psychiatric evaluation.

Defendant in the Fourth Assignment of Error complains of the admission into evidence of the objects seized at the two crime scenes, arguing their admission violates his Fourth Amendment right to be protected from warrantless searches and seizures. In Assignment of Error Number Five, defendant alleges the trial court erred in allowing the State to introduce numerous color photographs of the five homicide victims. The final assignment of error contends the trial judge erred in failing to grant defendant's motion for a mistrial following a state witness's reference to defendant's theft of a radio.

We have added two issues not specifically addressed by counsel in brief to ensure full review, noting they were raised during oral argument. These issues are the finding of the sanity commission hearings and defendant's withdrawal of the dual plea of "not guilty and not guilty by reason of insanity."

We therefore treat in this opinion the six assignments of error, the additional issues, and we also review the sentence. Because we find no error in the trial court proceedings and find the conviction and sentence to be valid under the law, we affirm.

FACTS

The victims in this case were all related to defendant: two were his cousins, Randy Perry and Bryan LeBlanc; two were his parents, Grace and Chester Perry; and the fifth victim was defendant's two-year-old nephew, Anthony Bonin. They were shot in separate households located only two doors away from each other. The cousins died first in the residence located at 639 Louisiana Street in Lake Arthur, Louisiana. Defendant's parents and nephew died next, inside the Perry's home at 810 Seventh Street. The circumstantial evidence from which these facts were derived was presented by the prosecution through the testimony of a number of witnesses. Other information was obtained from a statement defendant gave to Deputy Herbert Durkes while defendant was incarcerated.

On July 17, 1983 defendant apparently entered the unlocked house on Louisiana Street in the early morning. He walked first to the living room couch where Randy Perry lay asleep. From a short distance of only a few feet, he fired into the left eye of his cousin. The accused then entered the bedroom where Bryan LeBlanc slept, and again fired the gun at the victim's head.

It appears defendant then walked across the yard to his parents' home at 810 Seventh Street and broke into the house. He listened to music for a while, awaiting his parents' arrival home from an out of town trip. His parents, on their return home, stopped to pick up the two-year-old, Antho-

ny Bonin, whom they cared for when his father worked offshore.

At about the time the parents arrived home, several people in the vicinity heard loud noises or gunshots. In the statement defendant gave to Deputy Durkes admitting to the five murders, defendant indicated his father came through the door first, followed by the child and the mother. According to this statement, he shot his father first, then his mother, and then the child. There appeared to be some struggle with his father, whose body was found crouching behind the television in the living room. Because his first attempt did not kill either of his parents, he shot both of them a second time in the head. Not being sure the child was dead, he shot him a second time also. After dragging his mother's body away from the door so he could close it, he took his father's billfold containing \$3,000 cash, and a strongbox belonging to his mother. He left the scene in his father's car.

The caretaker of the 639 Louisiana Street residence, Ernest Ashford, discovered the bodies of Randy Perry and Bryan LeBlanc shortly after 5:00 P.M. on July 19, 1983. The caretaker was the son-in-law of the owner of the house and the stepfather of Bryan LeBlanc. Ashford had a key to the house, and had entered the house out of concern for the diabetic Perry. Ashford notified police, who later entered the residence of Grace and Chester Perry and discovered the bodies of the other three victims.

Defendant became a suspect because of the bad relationship he had with his parents. Defendant lived in a trailer behind their home and was not allowed to enter their home without their permission. Zula Lyon, defendant's aunt, testified in the guilt phase of the trial that defendant's motive for the killings was to obtain insurance proceeds from his parents' policies. Another possible motive was the fact defendant's parents had taken him to a mental hospital in Galveston for examination when he was sixteen and had him committed to the Central State Hospital at Pine-

ville two years later. When his father was committing the murders, he was threatened to kill him, and he killed him because he gave this account of defendant's statement:

Why did the boys throw me out of the house, stole my money, and harassed me constantly? They made me live in that little trailer behind their house by all those stinking dog pens. They took all my money all the time, wouldn't let me in their house when I wanted. I just couldn't take it anymore.

I asked him why he killed the child. The kid was evil, some sort of devil, witch of some sort. I asked—I'm sorry. I said that the child was too young to do him any harm or even talk, so why kill him? He was a very smart kid, he said, too smart for his age. I had to make sure he was dead.

Defendant arrived in Washington, D.C. on July 18, 1983, the day after the murders were committed. He checked into the Annex Hotel. While there, he paid rent in advance for his room, giving the clerk five one hundred dollar bills. He also bought numerous items from a television store, which were loaded by a clerk into a car matching the description of that owned by his father. On July 31, 1983 defendant had an encounter with another guest at the Annex Hotel which led to the police being called. An officer ran a routine check on defendant and learned he was wanted in Louisiana for five counts of homicide. At the time of his arrest he had in his possession \$1,100 cash and a hotel key. Following his arrest, the Washington police obtained a search warrant for his hotel room. Among the evidence recovered was one of the recently purchased television sets, with the names of the five victims written on the side. The vehicle driven by Chester and Grace Perry on their trip was recovered approximately one week later in a Washington, D.C. police impoundment lot where

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STATE v. PERRY

Cite as 502 So.2d 543 (La. 1986)

ville two years later. According to testimony, he was infuriated at his parents for committing him and had consequently threatened to kill them. Interrogated as to why he killed the victims, Deputy Durkes gave this account of defendant's statement:

Why did you kill all those people? The boys threw me out of my grandmother's house, stole money from me all the time, and harassed me constantly. My mother and father wouldn't leave me alone. They made me live in that little trailer behind their house by all those stinking dog pens. They took all my money all the time, wouldn't let me in their house when I wanted. I just couldn't take it anymore.

I asked him why he killed the child. The kid was evil, some sort of devil, witch of some sort. I asked—I'm sorry. I said that the child was too young to do him any harm or even talk, so why kill him? He was a very smart kid, he said, too smart for his age. I had to make sure he was dead.

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it had been towed for being parked in a no parking zone.

Following his transport back to Louisiana defendant was indicted on five counts of first degree murder. Defendant initially entered the dual plea of "not guilty and not guilty by reason of insanity" to each charge. A sanity hearing was held to determine his competency to stand trial, and the judge ordered he be sent to Feliciana Forensic Facility for further psychiatric evaluation. Subsequent to his return from this evaluation, another sanity hearing was held. At the close of this hearing defendant was allowed to withdraw his dual plea and enter the single plea of "not guilty," against the advice of counsel.

The issue of defendant's sanity is material to assignment of errors one and three, and is also relevant in the determination of whether or not defendant should have been permitted to withdraw the dual plea initially entered and replace it with a plea of "not guilty." Even though not included in the assignment of errors, we address the finding of the sanity commission hearings and the withdrawal of the dual plea because of their overall importance and effect on other assigned errors, and because we deem it imperative to afford a defendant assessed the death penalty a review of all issues raised in his behalf regardless of whether formally asserted.

DETERMINATION OF COMPETENCY

Defendant was the subject of two sanity commission hearings, the first on September 26, 1983 and the second on March 1, 1985. The first commission was composed of Dr. Louis E. Shirley, Jr., a general practitioner with some capacity to treat psychiatric disorders, and Dr. Young Hee Kang, a general practitioner who completed a residency in psychiatry. After brief interviews with the defendant in the parish jail on September 26, 1983, both were of the opinion he needed further psychiatric evaluation. They summarized their findings:

We find that he has a long history of paranoid schizophrenia and at this time is not in complete contact with reality and

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may be dangerous to himself and others. We were not able to ascertain his mental state at the time of the alleged offense(s). We feel that he needs complete psychiatric evaluation and therapy at this time.

As a result of this hearing the defendant was sent to the Feliciana Forensic Facility, for evaluation and treatment. The record does not reflect when the defendant was returned to Jefferson Davis Parish, but defendant was apparently returned in March of 1984.

Upon motion of the State, the second sanity commission was appointed. This commission was composed of the same two physicians who were on the first commission, plus an additional physician who specializes in psychiatry, Dr. Aretta J. Rathmell.

At this second commission hearing, the three physicians unanimously agreed defendant was mentally competent and could assist his counsel in his defense. The trial court agreed, finding the evidence clear, and ruled accordingly.

[1] It is fundamental to our adversary system of justice that a defendant who lacks the capacity to understand the proceedings against him or to assist counsel in preparing a defense may not be subjected to trial. La.Cr.P. art. 641; *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). This Court in *State v. Bennett*, 345 So.2d 1129 (La.1977), set forth the appropriate considerations which a trial judge must use in the determination of competency:

Appropriate considerations in determining whether the accused is fully aware of the nature of the proceedings include: whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not-guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. Facts to

consider in determining an accused's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett*, supra, at 1138.

It appears the examining physicians and court abided by these criteria. Dr. Rathmell, the psychiatrist, and the first of the three doctors on the commission to testify at the second sanity commission hearing, in particular paid attention to the criteria. She read from her report, which followed almost verbatim the factors set forth in *Bennett*, and concluded defendant was presently sane and able to proceed with trial. Her opinion was based on two ninety minute interviews with defendant, and evaluation of medical reports from the two State hospitals to which defendant had been committed. Some of these reports came from Feliciana Forensic Facility, and were the result of months of observation. She noted the records compiled by the psychiatrists at Central State Hospital at Pineville diagnosed the accused as having a paranoid illness, which she indicated is more of a character trait or state of mind than is the more serious schizophrenic illness. She characterized schizophrenia as a more incapacitating thinking disorder. She believed defendant has periodically had severe psychiatric problems, but agreed with the earlier psychiatric diagnoses from Central State Hospital. She found at the time of defendant's examination by her he was in remission of a paranoid illness. Though on cross-examination Dr. Rathmell admit-

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Dr. Shirley of defendant the criteria mell. Howe of them in tion. Dr. Sh the defenda his counsel charges aga in his defens also did not was of the o sel, understa understand conviction.

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ted other hospital records characterized the defendant as having paranoid schizophrenia, she noted those words always appeared with the signature of non-medical personnel. Dr. Rathmell noted no psychiatrist had ever documented the diagnosis of acute paranoid schizophrenia.

Dr. Shirley did not include in his opinion of defendant's mental condition as many of the criteria from *Bennett* as did Dr. Rathmell. However, he still addressed several of them in his testimony during examination. Dr. Shirley was firm in his conclusion the defendant seemed to be able to assist his counsel at trial, to be aware of the charges against him, and to be able to help in his defense. Dr. Kang, like Dr. Shirley, also did not include all of the criteria, but was of the opinion he could assist his counsel, understand the trial he was facing, and understand the consequences of possible conviction.

It should be noted additional support for the finding of competency is evident in the testimony of Dr. Theresa Jiminez, who testified during the penalty phase of defendant's trial. Dr. Jiminez is a certified psychiatrist, and was employed as clinical director at Feliciana Forensic Facility during the time defendant was being evaluated there under court order. Her duties included determining whether or not patients were mentally ill. She testified there are two types of mental illnesses: schizophrenia, which is a major mental illness, and those illnesses that constitute personality disorders. She classified defendant as having a personality disorder, of an anti-social type. She also indicated defendant is smart enough to act in a crazy manner if he feels he needs to do so. Further, she stated if a person is suffering acutely from a major mental illness, as opposed to a personality disorder, he would not have the capacity to plan and reason out his acts as was necessary for the crimes involved here. He would not be able to think logically, lay in wait for someone to come home, plan a murder, hide evidence, or know to flee from town.

A comparison of the length of examinations and credentials of Drs. Rathmell and Jiminez, as opposed to Drs. Shirley and Kang, is significant in weighing the opinions of each as to credibility. Drs. Shirley and Kang had both earlier diagnosed defendant as being paranoid schizophrenic. Dr. Rathmell spent approximately three times as long with defendant as did Drs. Shirley and Kang; Dr. Jiminez had the benefit of months of her own personal observation and reports of other staffers while the accused was a patient from October 1983 to March 1984. Both Drs. Rathmell and Jiminez are psychiatrists; neither Dr. Shirley or Dr. Kang is a psychiatrist. Dr. Shirley himself, during his testimony, indicated a willingness to defer to the greater experience and expertise of Dr. Rathmell.

[2] The defendant has the burden of establishing incapacity, because Louisiana law presumes the defendant is sane and responsible for his actions. La.R.S. 15:432. The defense must prove by a clear preponderance of the evidence the defendant is incompetent to stand trial as a result of a mental disease or defect. La.Cr.P. art. 641; *State v. Machon*, 410 So.2d 1065 (La. 1982). While a court is permitted to receive the aid of expert medical testimony on the issue, the ultimate decision of competency is the court's alone. La.Cr.P. art. 647; *State v. Rogers*, 419 So.2d 840 (La.1982). A trial court's determination of the mental capacity of a defendant is entitled to great weight, and his ruling will not be disturbed in the absence of manifest error. *State v. Morris*, 340 So.2d 195 (La. 1976).

[3] The weight of the evidence supports the trial court's determination of competency. The expert witnesses in the sanity commission hearing at which competency was found were examined thoroughly by both prosecution and defense. The three examining physicians were unanimous in their conclusion the defendant was able to proceed with trial. It is true there were some diagnoses of defendant as having paranoid schizophrenia, made by non-psy-

chiatrists. However, the weight of the evidence, in terms of both the duration of the interviews and expertise, supports the finding of either a personality disorder or paranoid illness, as opposed to the more disabling thinking disorder of schizophrenia. In light of this evaluation of expert testimony, we cannot find the trial court's determination of defendant's competency to be clearly erroneous.

WITHDRAWAL OF DUAL PLEA

The issue of withdrawal by defendant of the dual plea was considered by the trial judge immediately following the sanity hearing. Though the change of plea was not included in the assignment of errors, we address this issue because of its importance in assuring complete review and because it was raised during oral argument.

During the interval between the appointment of the second sanity commission and the hearing on March 1, 1985, the trial court received correspondence from the defendant. In this correspondence the defendant informed the court of his desire to withdraw his dual plea of "not guilty and not guilty by reason of insanity" and enter the single plea of "not guilty." The attorneys were notified of defendant's wish and of the court's intention to consider this request if the defendant was found mentally competent at the sanity hearing.

[4] Following the finding of competency, the defendant was informed the court was aware of his desire to withdraw his dual plea on all five counts and replace it with the single plea. He told the court emphatically he wanted to change the plea. The trial judge questioned the defendant about his education, learning he had completed 13 college hours of credit in general studies. The judge clarified and explained thoroughly what the plea of "not guilty and not guilty by reason of insanity" meant. Defendant related he and his attorneys had spoken at length about the change in plea, and in response to the judge's question, he again expressed his desire to withdraw the dual plea. Out of an abundance of caution, the judge called a

recess for the express purpose of providing defendant a final consultation with his attorneys, and specifically instructed defendant to listen to his attorneys. After a forty minute recess, the defendant had not changed his mind and still wanted to change his plea. Over the objection of his counsel, the court permitted defendant to withdraw his dual plea and enter a plea of "not guilty," relying on the holding of *State v. Clark*, 305 So.2d 457 (La.1974). The relevant portion of *Clark*, *supra*, provides as follows:

This Court cannot approve the trial court's action in requiring the defendant to maintain such an untenable position when he desires to withdraw the insanity portion of the dual plea unless there is some overriding rationale for refusing a defense request to withdraw such a plea. The reason for La.Cr.P. art. 561's specific time limits within which a defendant may of right change a simple "not guilty" plea to the dual insanity plea is to give the State adequate notice of defendant's intention to advance the insanity defense and adequate time to prepare in the face of such a defense. See Official Revision Comment to La.Cr.P. art. 561. No such rationale is applicable in the reverse situation. When defendant seeks to withdraw the insanity portion of a dual plea and stand on a simple "not guilty" plea, no prejudice to the prosecution results. However, denial of a request for permission to withdraw the dual plea results in substantial prejudice to the defendant in a criminal prosecution. The defendant may withdraw the dual plea and substitute the single plea of "not guilty" at any time prior to the presentment of the indictment and defendant's responsive plea to the jury. *Clark*, at 463.

It is true the instant case is distinguishable from *Clark*, as it does not appear in *Clark* the plea was withdrawn over counsel's objection. However, this Court has recently dealt with this specific issue in the capital case of *State v. Lowenfield*, 495 So.2d 1245 (La.1985), where the accused

also wished to withdraw his plea of insanity against his attorney's advice. The Court stated the following:

It appears beyond argument that when a competent defendant wishes to plead not guilty rather than not guilty by reason of insanity, and clearly understands the consequences of his choice, then the counsel must acquiesce to the wishes of his competent client. The court had no choice but to allow the defendant to withdraw his pleas and in this we find no error. . . . *Lowenfield*, at p. 1252.

We consequently find the trial court ruling permitting defendant to withdraw his plea is correct.

ASSIGNMENT OF ERROR NO. ONE

Defendant's first assignment of error challenges the admissibility of a statement he made on September 15, 1983 to Herbert L. Durkes, Jr., a jailer at the Jefferson Davis Parish jail during the time defendant was incarcerated there. Defendant argues primarily his mental state at that time prevented him from giving a free and voluntary statement.

In the early morning hours of September 15, 1983, defendant informed Durkes he wanted to confess. Durkes told defendant he would call Detective Ervin Trahan or Chief Deputy Ted Gary to hear his confession, but defendant said he did not want to talk to them because they did not want to listen to him. Durkes therefore secured the presence of Robert Lee, the other jailer on duty, and of Daniel Peer, a trustee. Peer stood out of defendant's line of vision, along the wall beside the door to defendant's cell. Durkes and Lee squatted down so they could listen at the opening in the steel cell door through which food is placed into the cell. From that position they could see defendant's face and shoulders. Durkes read defendant his *Miranda* rights and asked if he understood them, to which defendant responded yes. He asked defendant if he wanted a lawyer present and defendant said he did not. Durkes listened as defendant confessed and subsequently went to his desk and wrote down the ac-

count. Lee and Peer read the written statement and agreed it matched what defendant had said. Durkes took the handwritten statement to a typist who then typed it.

Before the State can introduce what purports to be a confession, it must affirmatively show it was made freely and voluntarily, and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La.R.S. 15:451. In addition, if the statement was made during custodial interrogation, the State bears the burden of showing defendant received and waived his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Nelson*, 459 So.2d 510 (La.1984).

At both the hearing on the motion to suppress and at trial, Durkes indicated he did not promise anything to defendant, did not threaten or intimidate him, coerce him or place any physical or mental duress upon him. Durkes described defendant as alert during the giving of the statement and stated he had defendant's full attention. Defendant made eye contact with Durkes and was responsive.

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Furthermore, the record clearly demonstrates Durkes read defendant his *Miranda* rights and defendant does not contend otherwise. Rather, defendant's attack on the admission of the confession focuses upon whether the statement was freely and voluntarily made, considering his mental condition at the time he gave it. He relies heavily on his having been diagnosed as paranoid schizophrenic a short time before giving the statement and was soon to be sent to Feliciana Forensic Facility. In order to assess the merit of this argument, it is necessary to review the testimony from the September 26, 1983 sanity commission hearing held shortly after the statement was given, as well as from the August 21, 1985 hearing on the motion to suppress where the statement was ruled admissible.

As earlier indicated, on September 26, 1983, Drs. Shirley and Kang examined defendant and testified at a sanity hearing

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held that same day. They concluded he was paranoid schizophrenic, and we have previously disregarded this finding in favor of the diagnoses provided by the more experienced psychiatrists. However, while defendant contends the characterization of paranoid schizophrenia by Drs. Shirley and Kang should result in his statement being excluded, we find much in their testimony which supports a finding it was made freely and voluntarily.

Dr. Shirley stated he found defendant well-oriented to time and place, and very up-to-date on current events. The doctor characterized him as very aware of what was going on around him, but determined defendant did have some "flights of fancy" during the examination in which he lost contact with reality. These "flights of fancy" did not occur all the time and resulted when certain subjects were brought up by the use of trigger words.¹

Dr. Kang, in her testimony, concurred in Dr. Shirley's finding of defendant's "flights of fancy" being triggered by certain topics. They both felt further evaluation was necessary, and neither could ascertain what his mental state was at the time the offense was committed due to defendant's lack of recall of that time period.

Both doctors also testified at the hearing on the motion to suppress held on August 21, 1985. They reiterated their earlier testimony concerning defendant's "flights of fancy" being triggered by certain words or subjects. Dr. Shirley also stated a person with paranoid schizophrenia would be in touch with reality much of the time. Dr. Kang supported this by stating defendant was "more or less" cognizant of what was going on around him until the trigger words were mentioned.

Defendant relies upon *State v. Glover*, 343 So.2d 118 (La.1977), for his contention

1. As stated by Dr. Kang in the second sanity commission and the motion to suppress hearings, trigger words were used in examining the defendant to determine his reaction to subjects that had previously resulted in psychotic behavior on his part. This defendant reacts visibly to the words "Olivia Newton-John." The mention

that defendant's mental state precluded his confession from being free and voluntary. In *Glover, supra*, this Court ruled statements made by the defendant inadmissible because at the time he gave them it was probable he was actively psychotic and legally insane. It is true the defendant in *Glover*, like the defendant in this case, had been diagnosed as a paranoid schizophrenic. However, it should be noted *Glover* also was mentally retarded and suffered from organic brain damage.

Even were we to accept the characterization of the instant defendant as being paranoid schizophrenic, this should not automatically render his statements inadmissible. In *State v. West*, 408 So.2d 1302 (La.1982), this Court rejected defendant's argument that his paranoid schizophrenia made it impossible for him to give a voluntary statement, and ruled the admission of the challenged statements into evidence was not erroneous. The Court distinguished *West's* condition from that of *Glover*, noting in particular *Glover's* organic brain damage in addition to his mental illness, as well as the fact *Glover* received a very potent anti-psychotic drug.

[5] Defendant in this case appears to be more like *West* than *Glover*. He was not being medicated before he made the statement. There is no evidence he suffers from organic brain damage or is mentally retarded. To the contrary, when the trial judge questioned him in court to determine his understanding of the plea withdrawal issue, it was learned defendant had completed thirteen hours of college studies and left school because he fell behind. Drs. Shirley and Kang both stated defendant seemed in contact with reality until he heard the trigger words, and these words were not a part of the conversation between defendant and Durkes. The state-

of those words has caused him, after previously exhibiting no psychotic manifestations during an interview, to behave in a deviant manner. He would start rambling, become aggressive and hostile, and talk endlessly. In this way he evidences his loss of touch with reality.

ment given jumping from testified defendant made eye contact and attention.

The determination of a confession judge, and disturbed unless as a whole. (La.1984). not err in the defendant's decision to the exclusion. Thus, we find of error.

ASSIGNMENT

In this assignment, the State to introduce the testimony of Zula Lyon regarding statements made to her. He contends Mrs. Lyon served as an agent for the sheriff's office and, as such, *Miranda* warnings should have been given. Zula Lyon is the defendant's aunt and his mother's sister.

The statements complained of were given on two of the ten to twelve occasions defendant was visited by Mrs. Lyon in 1983. On September 16, 1983, he told his aunt he remembered the murders and had killed five people. He wrote the victims' names down on a piece of paper he had in his cell. He also told her his father had \$3,000 in his wallet, which he took. He related he used pistols and shotguns to kill the victims, and disposed of the weapons and some luggage in a canal.

On September 30, 1983, as Mrs. Lyon was preparing to leave after a visit with defendant, he again told her he killed the people. He added the judge did not want him to plead guilty because the case was too serious. He said he was guilty and repeated he had killed the people.

It is evident from Mrs. Lyon's testimony she had motives in visiting defendant other

than to solicit information for the sheriff. While she admitted she had asked defendant questions about the murders on some of her visits, she specifically stated she had not questioned him on September 16, 1983. The purpose of her visit on that date was to bring winter clothing to defendant in preparation for his transfer to the Feliciana Forensic Facility. She also expressly stated she had never been asked to question defendant.

Similarly, the reason for her visit on September 30, 1983 was to visit him one more time before defendant left for Feliciana Forensic Facility, to see what his state of mind was and to see if he was in need of anything. It is clear Mrs. Lyon did not question him on that date. According to her testimony, the statement on that date was volunteered by defendant as Mrs. Lyon was getting ready to leave.

Defendant alleges Mrs. Lyon received special treatment from the sheriff's office, implying this would not have been the case had she not been eliciting information with the intention of relaying it to the sheriff. While it is true on some of her visits to defendant Mrs. Lyon talked with him in the sheriff's office, her testimony also makes it clear she did on some occasions see him in his jail cell in solitary confinement. Also, although she admitted she talked with the deputies a number of times about the case, she maintained they never asked her what defendant had said to her.

From Mrs. Lyon's testimony, it does not appear she was acting on behalf of the sheriff's office when she visited defendant and talked with him about the crimes. In particular, it should be noted neither statement was the result of questioning by her and both statements were instead unsolicited, spontaneous confessions of guilt.

This Court has previously considered a similar situation in *State v. Loyd*, 425 So.2d 710 (La.1982). Loyd was given his *Miranda* rights and the defendant made incriminating statements after invoking his right to silence. These statements were elicited by defendant's mother who had

ment given does not indicate rambling or jumping from subject to subject. Durkes testified defendant was alert, responsive, made eye contact, and gave Durkes his full attention during the giving of the statement.

The determination of the admissibility of a confession is a question for the trial judge, and his conclusion will not be disturbed unless not supported by the record as a whole. *State v. Nuccio*, 454 So.2d 93 (La.1984). We conclude the trial judge did not err in ruling the statement was admissible. The evidence supports his finding defendant did not suffer from mental illness to the degree necessary to result in exclusion because of involuntariness. Thus, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. TWO

In this assignment of error defendant alleges the trial court erred in allowing the State to introduce the testimony of Zula Lyon regarding statements defendant made to her. He contends Mrs. Lyon served as an agent for the sheriff's office and, as such, *Miranda* warnings should have been given. Zula Lyon is the defendant's aunt and his mother's sister.

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It is evident from Mrs. Lyon's testimony she had motives in visiting defendant other

been called by a deputy for the express purpose of obtaining information from the defendant. She spoke with him once, did not receive adequate information, and later in the morning sought permission to talk with him again. The sheriff consented and asked her to try to extract information regarding the whereabouts of the missing child. After she talked with her son, a family friend also talked with him. Then defendant's mother had another conversation with him. Before this conversation the sheriff requested that she ask her son if he would talk with the deputies.

Loyd challenged the admissibility of incriminating statements made to his mother, asserting they were not admissible because they came after he had exercised his right to cut off questioning. The Court held otherwise, reasoning the questioning by defendant's mother occurred out of the officers' presence. It noted police efforts to elicit incriminating statements from him did not constitute custodial interrogation within the meaning of *Miranda*, unless a person realizes he is dealing with the police. The Court specifically stated the mother "was not a police officer or agent..." *Loyd* at 717. The Court continued with the following:

Consequently, in the absence of any interplay between police custody and police interrogation, the mere fact that the defendant was in custody was not so intimidating, nor his mother's questioning so menacing, as to bring *Miranda* into play. *Loyd* at 717.

The Court in *Loyd* relied on its earlier decision in *State v. Rebstock*, 418 So.2d 1306 (La.1982), where the sixteen-year-old charged with commission of the crime challenged the admissibility of an inculpatory statement made to his father before being advised of his *Miranda* rights. The Court ruled the statement was admissible, despite the argument by defendant the father acted as an agent of the police and thus violated his constitutional rights. The Court said the father voluntarily undertook to question his son, and their brief conversation was not an extension of police interro-

gation. It noted the compulsion conceptualized in *Miranda* as resulting from interrogation was not present. Finding the defendant and his father had a short private conversation, out of the presence of the police, the Court ruled the defendant was not subjected to interrogation as defined in *Miranda*.

[6] After reviewing the circumstances under which the statements were given and the applicable case law, we find no error in their admission by the lower court. This is especially required after comparing the instant situation to the more compelling facts in *Loyd*, in which this Court refused to exclude the statements given by the defendant to his mother. We find Mrs. Lyon was not acting as an agent for the sheriff. She did not question him on the two dates he gave the unsolicited confessions. Both statements were made when no police were present, so they were not the product of custodial interrogations. We particularly note the first of the statements came the day after defendant had confessed to Durkes. Apparently defendant was simply ready to confess. We accordingly find no merit in this assignment.

ASSIGNMENT OF ERROR NO. THREE

Defendant complains in his third assignment of error of yet another statement admitted into evidence against him. He made this statement while enroute to the Feliciana Forensic Facility.

Sheriff Dallas Cormier and Deputy Ervin Trahan transported defendant on this trip. Sheriff Cormier had invited defendant's counsel to accompany them, but counsel declined stating he was too busy. While enroute, defendant began spontaneously talking about the case. Neither the sheriff nor deputy questioned defendant or initiated conversation about the five counts against him. Rather Sheriff Cormier told defendant not to say anything because they did not want to talk about the case without his attorney present. Defendant nevertheless continued, on his own volition, to talk. Several times he asked Deputy Trahan if they had found the guns used in the homi-

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cides. Trahan eventually replied they had not. Defendant then explained where the weapons could be found. During the trip defendant also spoke about his family members who had been killed, and wondered about the judge handling the case, inquiring as to whether he had sentenced anyone to the electric chair.

Defendant contends the statement regarding the location of the guns should not be admissible because the doctors had already diagnosed him as paranoid schizophrenic, referring the Court to his first assignment of error. As discussed above, we have earlier disregarded this testimony. However, even were we to agree with this medical conclusion, the diagnosing doctors testified defendant lost contact with reality when the trigger words, Olivia Newton-John, were used. Otherwise, defendant remained in contact with reality. We note Deputy Trahan testified those trigger words were not brought up during the trip to Feliciana.

[7] Nonetheless, the circumstances in which this statement was given differ from those of the statement challenged in the earlier assignment of error. Both the sheriff and deputy testified defendant talked throughout the entirety of the trip, and said he changed subjects frequently. This might suggest defendant's mental state was less stable than it was when he spoke with Durkes. However, in rebuttal to that possible conclusion is the fact defendant always returned to and primarily wanted to talk about the subject of the murders. He also did not change topics to the extent he would change them in mid-sentence. Sheriff Cormier testified defendant was awake and remained alert during the trip. These facts indicate to us defendant was in contact with reality during the trip and wanted to convey the information regarding the location of the guns to the sheriff and deputy. Moreover, the accuracy of the statements was borne out when the police recovered the guns from the drainage canal defendant had suggested they search. As the State argues in brief, this shows defendant was in touch with reality when he

made the statements. We find the trial judge correct in ruling the statement should not be excluded because of defendant's mental condition.

[8] Defendant raises another objection to the admissibility of this statement, relying on La.R.S. 15:450. He argues the statement should not be admitted because it was only part of the conversation which took place during the trip to the Feliciana Forensic Facility. La.R.S. 15:450 mandates the following:

Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.

In brief defendant objects in particular on the ground that admitting only part of the confession prevented him from showing the true state of defendant's mind, how defendant changed from topic to topic during the course of his statement and how defendant was or was not in touch with reality. He contends the only portion of the statement admitted was that part beneficial to the prosecution.

A reading of the transcript reveals defense counsel did not object to the statement on the basis of La.R.S. 15:450 during direct examination. It was not until defense counsel had cross-examined Deputy Trahan rather extensively that he objected. Under these circumstances, it appears objection came too late.

Furthermore, both defense counsel and the prosecution questioned Deputy Trahan thoroughly about defendant's conversation and did elicit information in addition to that concerning the location of the guns. Trahan indicated defendant "rattled on" about a number of subjects, including whether the trial judge had ever sent anyone to the electric chair and the fact he had thrown a strong box containing a check over a bridge while going to Baton Rouge.

Finally, even if the whole statement was not admitted into evidence, this Court has

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treated a similar situation in *State v. Mar-million*, 339 So.2d 788 (La.1976). It found the following:

Nevertheless, in the absence of proof to the contrary, the fact that the purported statement of the accused as testified to by the investigating officer does not consist of a verbatim reiteration of the conversation between them, due to the witness' inability to recall or other valid explanation, the rights of the accused under Section 450 are not violated. The law does not require the production of nonexistent portions of the confession or portions which cannot be recalled. *Mar-million, supra*, at 793.

We find this assignment seeking exclusion of defendant's statement during transport to be without merit.

ASSIGNMENT OF ERROR NO. FOUR

The defendant seeks by this assigned error to suppress all evidence seized at the two murder scenes on the day or days following discovery of the bodies. He contends the admission of this crime scene evidence violates his right and the public's right to be protected from warrantless searches and seizures.

There is no dispute the officers had a right to make warrantless entries of the two murder scenes on the reasonable belief persons within might be in need of immediate aid, to see if there were other victims and to determine if the perpetrator of the crimes was still on the premises. *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The sheriff's office secured both crime scenes until the next day and re-entered on July 20, 1983 to conduct an investigatory search, collecting evidence and removing items which required laboratory analysis. These subsequent searches of the murder scenes were warrantless although, as the State concedes, there was time to obtain a search warrant for the murder scenes. In fact a warrant was obtained to enter and search the trailer which the defendant occupied. Defendant had a privacy and proprietary interest in his deceased parent's house, he

argues. Moreover, defendant argues the public has an interest in preventing the admission of evidence from an illegal search. (The argument of the public's right against warrantless search and seizure was raised in brief and oral argument, but no authority was given.)

Defendant relies upon *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), which he cites for one proposition: there is no murder scene exception, therefore, a warrantless search is not constitutionally acceptable simply because a homicide has recently occurred there. *Thompson v. Louisiana* over-turned this Court's opinion, *State v. Thompson*, 448 So.2d 666 (La.1984), which held a warrantless search of defendant's home was valid when defendant had a diminished expectation of privacy in her home because she called for aid after murdering her husband, and because her daughter, called by her mother, let the police in on her apparent authority over the premises.

The U.S. Supreme Court held the opinion was indistinguishable from and conflicting with *Mincey v. Arizona, supra*. *Thompson* was tried for the murder of her husband. Deputies were summoned to the house by defendant's daughter, who reported a homicide. The daughter said the defendant shot her husband, attempted suicide by ingesting pills, but then called her daughter, told her of her acts and asked for help. The daughter called police and went to her parents' house, admitting the deputies. The deputies found the defendant unconscious and her husband dead of a gunshot wound. Defendant was transported to the hospital. Homicide investigators arrived thirty-five minutes later, entered the premises and searched the scene for two hours, locating incriminating evidence of the murder and attempted suicide.

The Supreme Court held the two-hour general search of defendant's house was a significant intrusion on her privacy and was invalid without a warrant. Discovery of the evidence did not occur in the initial sweep of the house for victims or the killer.

or in the plain entry. Defendant argues the public has an interest in preventing the admission of evidence from an illegal search. (The argument of the public's right against warrantless search and seizure was raised in brief and oral argument, but no authority was given.)

The State entered the murder scene at 639 Louisiana Street upon the consent of Paul "Blue" Perry and Edward Ashford. Three men resided at this house: Paul "Blue" Perry and the victims Randall Perry and Bryan LeBlanc. Ashford was the caretaker for this house and his stepson, Bryan LeBlanc, lived there. Ashford's wife was concerned about Bryan, a diabetic, and Ashford went to the house about 5 P.M. on July 19, 1983, at her urging. He found the doors locked and could not get an answer from within. The front door fell off its hinges as he knocked on it. He walked in and discovered the bodies. After Ashford sought police help, he met the police chief at the house and told him to go inside. After other officers arrived, two officers walked to the Perry residence two doors away and saw on the carport floor pieces of flesh, skull and bone marrow. They then entered the second murder scene, at 810 Seventh Street.

The State argues it had the initial consent of Ashford, the caretaker, to enter 639 Louisiana Street. The only surviving resident of the house at 639 Louisiana was Paul "Blue" Perry, who was working on an offshore oil rig at the time of the murders. Chief Deputy Ted Gary said he spoke to "Blue" Perry and obtained consent for the continuing searches of his house. Perry was returned to Lake Arthur after the bodies were discovered. Gary recalled talking to Blue Perry before re-entering the house. In addition, the State argues, Ashford was sufficiently related to the house to give consent. Ashford was the

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or in the plain view exception in the initial entry. Defendant's call for help did not convert her home into a public place where no warrant is required. The Supreme Court in *Thompson* reaffirmed the rule that "searches, conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." Consent is one of the exceptions to the warrant requirement.

The State contends police lawfully entered the murder scene at 639 Louisiana Street upon the consent of Paul "Blue" Perry and Edward Ashford. Three men resided at this house: Paul "Blue" Perry and the victims Randall Perry and Bryan LeBlanc. Ashford was the caretaker for this house and his stepson, Bryan LeBlanc, lived there. Ashford's wife was concerned about Bryan, a diabetic, and Ashford went to the house about 5 P.M. on July 19, 1983, at her urging. He found the doors locked and could not get an answer from within. The front door fell off its hinges as he knocked on it. He walked in and discovered the bodies. After Ashford sought police help, he met the police chief at the house and told him to go inside. After other officers arrived, two officers walked to the Perry residence two doors away and saw on the carport floor pieces of flesh, skull and bone marrow. They then entered the second murder scene, at 810 Seventh Street.

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caretaker, had a key to the house, and had ongoing permission to enter the house whenever he deemed it necessary.

[9] There is no showing that defendant possessed any privacy interest at 639 Louisiana Street. He did not reside there and had no property there. Neither Ashford nor Blue Perry withdrew the consents to search the house. Both had sufficient interest in the house to give valid consent to enter for all the searches. We uphold the warrantless searches of 639 Louisiana Street as lawful consent searches.

Defendant also objects to the evidence seized at 810 Seventh Street, where his parents lived. The bodies of his parents and two-year-old Anthony Bonin were found inside, when deputies entered after finding the two bodies at 639 Louisiana Street and discovering pieces of skull, flesh and bone marrow in the carport outside 810 Seventh Street. Again, the initial entry was unequivocally lawful, since officers were searching for victims or suspects.

[10] Michael Owen Perry did not reside at 810 Seventh Street at the time of the murders. He lived in a trailer behind his parents' home. There is ample evidence that defendant was not permitted in his parents' home without their permission. The doors were kept locked and Michael Owen Perry was not given a key. He had to knock to be admitted. There was no showing defendant had any of his property within his parents' home, or that he used it as an extension of his residence. Officers found evidence of forced entry into the house. Defendant's statement to the jailer admitted he broke into the house to wait for his parents. There is no proof defendant had a privacy interest at 810 Seventh Street. To the contrary, he could not enter the house of his own will and he had no property inside. This case is distinguishable from *Mincey* and *Thompson*, where in both cases the defendant's home was searched. There was no living person who had a privacy interest in the house at 810 Seventh Street. Therefore, the entries of

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the house were not in violation of anyone's privacy interest.

The Louisiana Constitution does not limit standing to challenge a search to those who live in the premises and thus have a reasonable expectation of privacy in it. La. Const. Art. I, § 5 provides in pertinent part: "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." (Emphasis added.) The first part of the section states that every person has the right to "be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy." Thus, it seems that there must be an invasion of *someone's* rights to privacy before there can be an unreasonable search.

It is well settled that the Fourth Amendment to the United States Constitution protects people, not places. It is the individual's reasonable expectation of privacy that our society values and the constitution protects. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

State v. Hines, 323 So.2d 449, 450 (La. 1975).

Michael Owen Perry was a resident of the trailer and the search of that residence was with a warrant. The evidence seized from the two murder scenes was properly admitted into evidence. There is no merit in this assignment.

ASSIGNMENT OF ERROR NO. FIVE

Defendant argues the trial court erred in allowing the State to present to the jurors numerous color photographs of the five homicide victims. He contends the photographs were not necessary for any probative purpose and inflamed the jury, overwhelming their reason. (We will discuss later in this opinion whether the use of the photographs introduced an arbitrary factor into the jury's sentencing recommendation.) The photographs were unnecessary, he argues, because the pathologist who performed the autopsies testified to the cause

of death, the location and number of gunshot wounds, the type of weapon used and the approximate distance of the victim from the gun when fired. Sheriff's deputies testified in great detail to the location of the victims in the house, the location of gunshot holes in the walls, the splatter of blood, tissue and brains; the deputies used drawings, cut outs and body figures to illustrate their testimony.

Defendant objected timely at trial to the admission of the photographs into evidence. The judge admitted the photographs in evidence, commenting, "I think the probative value will outweigh whatever prejudicial effect could happen. I realize, of course, that they are unpleasant pictures to look at but that's one of the situations that we, as well as jurors, have to face in a case of this kind.... It corroborates everything this doctor (the pathologist) was saying in the cause and effect and the other aspects, and I think that the corroboration in this matter is very important, so we're going to admit them."

The State introduced a total of 170 color photographs in evidence. The photos show the interior and exterior of the two houses, the condition of the house as it was found and photos of the houses after the victims were removed. There are eight photos taken at the pathologist's directions before he began autopsies. The total also includes four portraits of the victims as they appeared in life. The great majority of the photographs are a painstaking photographic tour through the two houses, with officers taking pictures of all conceivably relevant evidence. Of the 158 photos taken at the two murder scenes, 23 show one or more of the victims.

The photographs of the remains of five murdered persons can not be less than gruesome. The pictures are unpleasant. All the victims were struck in the head with blasts from a shotgun fired at close range, sometimes at point-blank range. Many of the photographs show the destruction of the skulls, particularly the photographs taken prior to autopsy. No amount of testimony or the use of diagrams can

depict the murder photographs.

[11] The defendant argues that the State to use drawings instead of photographs cannot deprive the defendant of its case by offering to stipulate to what is shown in photographs. *State v. Watson*, 449 So.2d 1321 (La. 1984); *State v. Lindsey*, 404 So.2d 466 (La. 1981). The court's admission of allegedly gruesome photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. *State v. Watson*, supra; *State v. Boyer*, 406 So.2d 143 (La. 1981).

[12] The photographs are clearly relevant, corroborating the testimony of the State's witnesses as to the location of the bodies, the apparent sequence the murders occurred in and the multiple gunshot wounds to at least two of the victims.

This Court will not find the photographic evidence was admitted in error unless the photographs are so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. *State v. Ward*, 483 So.2d 578 (La. 1986).

The photographs during the trial's guilt phase following testimony of the investigating officers and the pathologist on Friday, October 25, and Saturday, October 26, 1985, respectively. The court recessed for the weekend following introduction of the last of the photographs. Trial resumed Monday, October 28, 1985. Guilty verdicts were returned October 31, 1985, and the jury deliberated and decided on the death penalty the same date. The emotional impact of the photographs had time to dissipate before the photographs had time to impress upon the individual juror the seriousness of the task to which he or she was sworn. The State was entitled to no less.

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This Court, in *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), considered the admissibility of photographs of five murder victims. Lowenfield was convicted of murdering four adults and one child in his former girlfriend's house. All the victims were shot in the head and all suffered multiple gunshot wounds. The weapons used were a .38 caliber pistol and a .22 caliber rifle. This court found the prejudicial effect of the pictures did not outweigh their probative value. The photographs of murder victims are admissible to prove corpus delicti, to identify the victims, to corroborate the cause of death and to show location, placement and severity of wounds. One photograph of each victim was put into evidence.

We find the photographic evidence was relevant and probative in proving the State's case against Michael Owen Perry. They proved corpus delicti, helped identify the victims, corroborated the cause of death, the types of weapons used and the location and severity of the wounds. We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. SIX

[13] Defendant's sixth and final assignment of error contends the trial judge erred when he failed to grant defendant's motion for a mistrial following a state witness's oblique reference to the defendant's theft of a radio. Defendant argues this evidence of other crimes prejudiced the jury against him and led to his conviction on five counts of first degree murder.

We find no merit in this assignment of error. This Court has addressed similar situations and found other crimes evidence insignificant when weighed against the offense for which the defendant was on trial. *State v. Parker*, 421 So.2d 834 (La. 1982), cert. den., 460 U.S. 1044, 103 S.Ct. 1443, 75 L.Ed.2d 799; *State v. Abercrombie*, 375 So.2d 1170 (La. 1979), cert. den., 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787. In *Parker*, supra, the defendant was on trial for two counts of first degree murder in connection with the armed robbery of a restaurant. Defendant's arrest came 17

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days after the robbery-murders, following another armed robbery, when police chased the car defendant occupied. The prosecutor carefully deleted reference to the second armed robbery but explained the apprehension of defendant as the consequence of a traffic violation. This Court said: "The evidence of misdemeanor traffic violations was hardly evidence of other crimes of any significance and did not portray him prejudicially as a 'bad man' capable of murder." *Parker* at 840. The same thing, in the context of multiple murders, might reasonably be said of the theft of a radio.

In *Abercrombie*, *supra*, there was evidence of a minor vandalism, but the Court said such evidence would not "inflame a jury to the point that it would be influenced to convict an accused of first degree murder." *Abercrombie* at 1176.

The reference to Perry's alleged theft occurred in the explanation of his apprehension in Washington, D.C. The murders occurred in Lake Arthur, Louisiana, around noon on July 17, 1983. Perry arrived in Washington, D.C. in late evening on July 18, 1983. The bodies were discovered the next day. Perry was arrested July 30, 1983. He came to the attention of Washington police after a person checking into a Washington hotel complained Perry walked off with a radio belonging to the hotel guest. The Washington policeman testified he was merely running a routine check on the man involved in the theft complaint when he was informed Perry was wanted in Louisiana for five murders. The policeman had not yet arrested Perry for theft.

An explanation of the Washington arrest was necessary to lay the foundation for introduction of evidence found in Perry's Washington hotel room, and the discovery of Perry's parents' automobile in Washington. A television set recovered from the Washington hotel room was found with the names of all five victims marked on the side of the set. The mention of Perry's alleged theft of the radio came as the prosecutor questioned Washington patrolman James Young about how he came into con-

tact with Perry. Young said Perry and the complainant were disputing the ownership of a radio. Defendant objected timely.

The defendant is correct that the State may not introduce evidence of other crimes without giving notice that it intends to do so. *State v. Prieur*, 277 So.2d 126 (La. 1973). The State replies it never intended to introduce evidence of the theft of the radio and carefully avoided saying theft. In fact, the prosecutor replies, the defendant's counsel was the first person to categorize the encounter as a complaint of a theft.

We find no merit in this assignment. The evidence of the theft of a radio pales in significance to the five counts of first degree murder and would not portray defendant as a "bad man" capable of murder.

CAPITAL SENTENCE REVIEW

This Court reviews every death sentence to determine if the penalty is excessive. La.Cr.P. art. 905.9 and Louisiana Supreme Court Rule 28. The Court is required to determine:

- Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

PASSION, PREJUDICE AND ARBITRARY FACTORS

The jury's conviction of Perry for first degree murder on all five counts was supported by the jury's finding of two aggravating circumstances on each count: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious or cruel manner.

[14] We have previously discussed, in Assignment of Error Number Five, the

State's use of multiple color photographs of the victims, and the effect of the photographs during the guilt stage. We now decide if the photographs introduced an arbitrary factor into the jury's recommendation of the death penalty.

The photographs were introduced in the guilt phase, and were not used in the sentencing phase to arouse the jurors' hostility toward the defendant. In the context of a case with substantial proof of guilt for five unprovoked murders a death penalty recommendation is not surprising. It is difficult to believe the photographs pushed the jury toward a recommendation of death for this mass murder.

The State contended the murders were committed in an especially heinous, atrocious or cruel manner. To prove this, the State introduced, inter alia, photographs of the victims.

The use of evidence to prove a statutorily enumerated circumstance in support of the death penalty, although it may prejudice the defendant's interests, does not introduce an arbitrary or prejudicial factor sufficient to require the penalty be set aside. We find the evidence of this alleged aggravating circumstance did not constitute an arbitrary factor in the proceedings.

[15] The defendant contends further the jury was influenced by an arbitrary factor when the prosecutor misstated the law during closing argument of the sentencing phase. We find the misstatement does not present reversible error. The prosecutor spoke only in rebuttal of defense counsel's closing argument, but during that rebuttal, the prosecutor said, "The law says any person that's convicted of a first degree murder shall be sentenced to death."

The Court will not reverse on the basis of an improper comment during closing argument unless the Court is convinced the comment influenced the jury and contributed to the verdict. *State v. Bates*, 495 So.2d 1262 (La.1986); *State v. Ford*, 489 So.2d 1250 (La.1986). There was no defense objection to this misstatement of the law.

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The misstatement was overcome by the judge's instructions to the jury. The court correctly stated the law requires a unanimous finding of an aggravating circumstance and requires the weighing of any mitigating circumstances prior to the jury's decision to consider the death penalty. The judge's charge in effect informed the jury a person found guilty of first degree murder does not automatically receive the death sentence.

MITIGATING CIRCUMSTANCES

[16] The defense argues the jury ignored the mitigating circumstances of defendant's alleged mental disorders. The defense counsel used its closing argument at sentencing to focus on defendant's mental condition. Counsel asked the jurors to consider defendant's appearance, mannerisms and conduct during the eight-day trial. Defendant's counsel said the defendant was not like normal people, that he had a mental disorder which caused him to commit a vicious crime, which normal people abhor. Three doctors had testified the defendant suffers from a mental disorder, the jury was reminded. The prosecutor's rebuttal said murderers are not ordinary people: "That's why they do what they do." He said the physicians who believed defendant was sane observed him for five months at a mental institution. Through both the defense counsel's argument and the court's instructions to the jury, the jurors were reminded they had to consider mitigating circumstances.

Defense counsel argues the mitigating circumstances were apparently overlooked by the jury. We find the conflicting medical testimony on defendant's mental condition was provided to the jury and the jurors chose to believe the State's experts, that the defendant did not suffer from a mental disorder so overwhelming that he was insane or unable to control or understand his actions.

STATUTORY AGGRAVATING CIRCUMSTANCES

[17] The jury found the evidence supported the existence of two aggravating

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circumstances: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious, or cruel manner.

The evidence fully supports the aggravating circumstance: defendant knowingly created a risk of death or great bodily harm to more than one person. He killed two young men at 639 Louisiana Street within seconds. Defendant's parents and his two-year-old nephew were gunned down as they entered their home. He not only created a risk of death to more than one person at each crime scene but converted the risk into accomplished actuality. The random firing of weapons, as shown by the physical evidence, cannot be less than a risk of death to the multiple persons present at the scenes.

The jury's finding that the murders were committed in an especially heinous, atrocious or cruel manner was previously discussed in the consideration of arbitrary factors in sentencing. It is unnecessary that we consider the subject matter in the context of statutory aggravating circumstances. Only one aggravating circumstance need be found for the imposition of the death penalty. La.Cr.P. art. 905.3; *State v. Bates*, supra; *State v. Byrne*, 483 So.2d 564 (La.1986); *State v. Rault*, 445 So.2d 1203 (La.1984). Since we have determined the jury was correct in finding the offender created a risk of death or great bodily harm to more than one person, the death penalty is validated.

PROPORTIONALITY OF THE SENTENCE

[18] The Court is required to weigh the sentence of death against the particular defendant and the offense(s) of which he is found guilty.

Michael Owen Perry was 28 when he committed these five murders. He lived in a small trailer behind his parents' home. He was unemployed, despite having graduated from high school, then attending one university briefly and later completing thirteen hours of college credit at LSU-Eunice.

His work history was brief. He either resigned or was fired from his jobs. His uncle said the defendant stated he would not work because his parents had to support him.

Perry was one of three children. His brother died in an oil rig accident. Susan, his sister, has been committed to Central Louisiana State Hospital on several occasions. Perry's history of emotional or mental disorders dates to 1979, when his parents asked he be examined by psychiatrists at the University of Texas Medical Branch Hospital at Galveston. There is no evidence he was hospitalized then. In March 1981, his parents obtained his commitment to Central State Hospital at Pineville. He was discharged on May 22, 1981 and referred to a community mental health clinic. On September 11, 1981, he was readmitted to the hospital at Pineville, but he walked away the same day and returned home, where his parents apparently allowed him to stay.

The reports of mental health professionals and general practitioners who examined him subsequent to the homicides has been set forth previously in great detail, and we will not reiterate that evidence. We note only the jury apparently chose to believe the state's expert witnesses and their opinion that the defendant's mental problems did not rise to the level of insanity. Even the physicians who testified for the defense said Michael Owen Perry was smart enough to act as if he were insane when it might benefit him. They also said Perry could conform his behavior to the norm most of the time.

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for

his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

We must also weigh this death sentence against the death sentences imposed in other cases in the jurisdiction in which this case was tried. *State v. Ford*, supra. If the recommended sentence is inconsistent with sentences imposed in similar cases, an inference of arbitrariness arises. *State v. Glass*, 455 So.2d 659 (La.1984).

Although the homicide was committed in Jefferson Davis Parish, East Baton Rouge Parish, where the jury recommended the death penalty. All those cases involved the death of one victim. One case was the rape and murder of an eleven-year-old child. The other four cases were murders committed during an armed robbery.

In *State v. Williams*, 392 So.2d 619 (La.1980), defendant James C. Williams was convicted of killing a service station owner during an armed robbery. The case was remanded by this Court for the judge's failure to instruct the jury that lack of a unanimous sentence recommendation would result in a sentence of life imprisonment. After remand, defendant received a life sentence.

Robert Wayne Williams was executed for the murder of a supermarket security guard during a holdup. *State v. Williams*, 383 So.2d 369 (La.1980), 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828. The victim was shot in the face with a shotgun.

Colin Clark was convicted of a murder-armed robbery and this court affirmed his conviction and death sentence, *State v. Clark*, 387 So.2d 1124 (La.1980). A federal court later reversed the conviction and the sentence. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir.1982). Clark subsequently entered a guilty plea to first degree murder without capital punishment.

brief. He either resigned or was fired from his jobs. His uncle said the defendant stated he would not work because his parents had to support him.

three children. His brother died in an oil rig accident. Susan, his sister, has been committed to Central Louisiana State Hospital on several occasions. Perry's history of emotional or mental disorders dates to 1979, when his parents asked he be examined by psychiatrists at the University of Texas Medical Branch Hospital at Galveston. There is no evidence he was hospitalized then. In March 1981, his parents obtained his commitment to Central State Hospital at Pineville. He was discharged on May 22, 1981 and referred to a community mental health clinic. On September 11, 1981, he was readmitted to the hospital at Pineville, but he walked away the same day and returned home, where his parents apparently allowed him to stay.

The reports of mental health professionals and general practitioners who examined him subsequent to the homicides has been set forth previously in great detail, and we will not reiterate that evidence. We note only the jury apparently chose to believe the state's expert witnesses and their opinion that the defendant's mental problems did not rise to the level of insanity. Even the physicians who testified for the defense said Michael Owen Perry was smart enough to act as if he were insane when it might benefit him. They also said Perry could conform his behavior to the norm most of the time.

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for

STATE v. PERRY

Cite as 502 So.2d 543 (La. 1986)

La. 563

his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

We must also weigh this death sentence against the death sentences imposed in other cases in the jurisdiction in which this case was tried. *State v. Ford*, supra. If the recommended sentence is inconsistent with sentences imposed in similar cases, an inference of arbitrariness arises. *State v. Glass*, 455 So.2d 659 (La.1984).

Although the homicides occurred in Jefferson Davis Parish, the trial was moved to East Baton Rouge Parish after the court experienced initial difficulty in selecting a jury. Since 1978, there have been five murder trials in East Baton Rouge Parish where the jury recommended the death penalty. All those cases involved the death of one victim. One case was the rape and murder of an eleven-year-old child. The other four cases were murders committed during an armed robbery.

In *State v. Williams*, 392 So.2d 619 (La.1980), defendant James C. Williams was convicted of killing a service station owner during an armed robbery. The case was remanded by this Court for the judge's failure to instruct the jury that lack of a unanimous sentence recommendation would result in a sentence of life imprisonment. After remand, defendant received a life sentence.

Robert Wayne Williams was executed for the murder of a supermarket security guard during a holdup. *State v. Williams*, 383 So.2d 369 (La.1980), 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828. The victim was shot in the face with a shotgun.

Colin Clark was convicted of a murder-armed robbery and this court affirmed his conviction and death sentence, *State v. Clark*, 387 So.2d 1124 (La.1980). A federal court later reversed the conviction and the sentence. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir.1982). Clark subsequently entered a guilty plea to first degree murder without capital punishment.

The conviction and death sentence of Andrew Lee Jones for the rape-murder of an eleven-year-old child was affirmed by this Court in *State v. Jones*, 474 So.2d 919 (La.1985), cert. den., — U.S. —, 106 S.Ct. 2906, 90 L.Ed.2d 993.

Jeffrey C. Clark killed his victim during an armed robbery. His conviction and death sentence were affirmed. *State v. Clark*, 492 So.2d 862 (La.1986).

None of these cases involves multiple victims. In Perry's case, the State argued the murders were committed during the perpetration of an aggravated burglary of the two houses and the armed robbery of Perry's parents. The jury did not return with a verdict agreeing with the state's argument on those circumstances.

In a case most similar to this one, this Court affirmed the death sentences imposed on Leslie Lowenfield for three counts of first degree murder. He was also convicted in Jefferson Parish of two counts of manslaughter. *State v. Lowenfield*, supra. Lowenfield killed his former girlfriend after she spurned him. He also killed three other members of her family and a neighbor who ran into the house when he heard gunshots. The psychiatrists who examined Lowenfield found him to be "angry, primitive, paranoid, and narcissistic." Lowenfield, unlike Perry, did not have a history of treatment in mental hospitals.

Defendant did kill all five victims in their homes. In *State v. Williams*, 490 So.2d 255 (La.1986), this Court found a review of death cases state-wide showed juries "often find death sentences appropriate where an innocent victim was murdered inside the sanctuary of his or her own home." *Williams*, supra at 264.

The death sentences for five offenses of first degree murder is not disproportionate to other cases in East Baton Rouge Parish where the death penalty was recommended.

SANITY DETERMINATION PRIOR TO EXECUTION

[19] The State of Louisiana will not execute one who has become insane subse-

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quent to his conviction of a capital crime. *State v. Allen*, 15 So.2d 870 (La.1943). No state imposes the death penalty on the insane. *Ford v. Wainwright*, — U.S. —, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the court or the prosecutor. La.C.Cr.P. art. 642.

If the defendant seeks a sanity commission prior to execution, he bears the burden of providing the trial court with a reasonable ground to believe he is presently insane. *State v. Allen*, supra; La.C.Cr.P. art. 642; *State v. Lowenfield*, supra. Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution.

We have discussed extensively Perry's mental capacity to proceed despite his withdrawal of the plea of "not guilty and not guilty by reason of insanity." We have determined the defendant was capable of proceeding at trial. A similar review might be in order prior to execution. We stress that the determination of defendant's sanity is for the trial judge, not a sanity commission alone. *State v. Rogers*, supra.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by La.R.S. 15:567 until

(a) defendant fails to petition the United States Supreme Court timely for certiorari,

(b) that court denies his petition for certiorari,

(c) having filed for and been denied certiorari defendant fails to petition the United States Supreme Court timely under their

prevailing Rules for rehearing of denial of certiorari, or

(d) that court denies his application for rehearing. CONVICTION AND SENTENCE AFFIRMED.



STATE ex rel. Curtis R. HINTON

v.

STATE of Louisiana.

No. 87-KH-0218.

Supreme Court of Louisiana.

Feb. 9, 1987.

In re: Hinton, Curtis R.; Applying for Remedial Writ; Parish of St. Mary 16th Judicial District Court Div. "E" Number 119,018.

ORDER

Writ granted. District court is ordered to provide relator access to the transcript of the trial court proceedings in case number 119,018, 16th Judicial District Court, Parish of St. Mary, for the purpose of preparing a brief in support of his writ application pending in this Court.



Robert A. BARNETT

v.

Shirley Lee, Wife of and Tang Ching LEE, ABC Insurance Company, Royal China Inc., DEF Insurance Company, Royal Place Inc., XYZ Insurance Company.

No. 87-C-0138.

Supreme Court of Louisiana.

Feb. 20, 1987.

In re Lee, Shirley; Lee, Tang Ching; ABC Insurance Co.; Royal China Inc.;

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RIVER

DEF Insurance Co.; Insurance Co.; Appellate and/or Review; Appeal, Fifth Circuit, Parish of Jefferson Court Div. "I" Number

Prior report: 497 (1986)

Writ granted. New trial ordered. Judgment in the district court by default. Under the circumstances defendant's relief after submission of judgment was not allowed to reopportunity of evidence granted a new trial district court.

DIXON, C.J., and COLE, JJ., dissent.

DIXON, C.J., is of the opinion that the trial judge did not err and has never shown the defense to plaintiff's



STATE of

Shelby

No. 86-

Supreme Court

Feb. 2

Reconsidered April

In re Arabie, Shell of Certiorari and/or of Appeal, First Circuit, KA-86-0088; Rouge 19th Judicial District Number 08-85-314, 1

Prior report: La. Denied.

SUPREME COURT OF THE UNITED STATES

NO. 89-5120

ORIGINAL

MICHAEL OWEN PERRY,

PETITIONER

VERSUS

STATE OF LOUISIANA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF RESPONDENT, THE STATE OF LOUISIANA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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Supreme Court, U.S.
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ISSUES PRESENTED

- I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?
- II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that

once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its parens patriae and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.

The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral, expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ___ U.S. ___, 107 S.Ct. 2207, ___ L.Ed.2d ___, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989), ___ L.Ed.2d ___, (1989). In Penry this court held, in part, that the Eighth Amendment did not prohibit the execution of a

mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Penry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Penry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Penry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.¹ Any medication administered, has been only upon his physician's

1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.

order and directive, and administered only at regulated intervals.² While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).

a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.

ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off

antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.³

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford, citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. ___, 109 S.Ct. 2765, ___ L.Ed.2d ___ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).

status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

"It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

"It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipsychotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only

prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry abruptly removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Goode" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating

psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side effects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. Ford illustrates the argument that mental illness per se is not a bar to imposing

the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Penry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Penry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right.

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's

writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Haldol medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Haldol treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, in view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of

achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).

The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce

insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)⁴

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Mardol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution,...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448, (Footnote No. 16; citation omitted).

4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, ___ So.2d ___ (La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, ___ So.2d ___ (La. 1989) (June 16, 1989) ruled against the petitioner.

Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in being free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,

445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in Vitek could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in Montanye v. Haymes 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent

death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. Wolff v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Haldol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Haldol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments "did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the

unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Haldol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Haldol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Haldol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that

Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming *arguendo* that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state *its* authority to medicate Perry against his will "upon a finding of incompetence."

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its *parens patriae* power to provide adequate medical care for its mentally ill citizens. At stake also was the state's *police power* to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. One need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under *Woodall v. Foti*, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a

"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's *parens patriae* power to administer, forcibly if necessary, antipsychotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972), citing from 3 W. Blackstone, Commentaries 47. Based on its *parens patriae* power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, *infra*, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:

"If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(I) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.

In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Penry and Stanford v. Kentucky, ___ U.S. ___, 109 S.Ct. 2969, ___ L.Ed.2d ___ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.

ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I

supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. ____ So.2d ____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d ____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve

competency to be executed.⁵

In view of the above givens and assumptions, the remaining questions are:

(1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?

and

(2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or

⁵ Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Penry v. Lynaugh. In Penry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.

antipsychotic drugs, including Haldol, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (R. pp. 43-44).

In view of the trial court's ruling on competency and accompanying order of treatment, we must necessarily address the questions of: (a) What procedural due process must accompany the inquiry into competency to be executed; (b) What procedural due process in fact accompanied the trial court's determination of Perry's competency to be executed; and (c) Did the trial court err in the conduct of the competency hearing?

(a) The procedural due process essence of Ford, which is designed to govern the inquiry into competency to be executed, requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker.

Initially, we must recognize that the Ford court addressed two issues. The first issue was whether there was an Eighth Amendment substantive right not to be executed while insane. A majority of the Court agreed on this issue. Second, there was the issue of what procedures must accompany the inquiry into sanity. This Court debated over the question. Justices Marshall, Powell, O'Connor and Rehnquist expressed differing opinions on the matter.

Louisiana commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning -- Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). There is no other evidence of consensus.

The State of Louisiana, suggests that procedural due process must satisfy basic fairness by providing the condemned with:

(1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard") (based on the expressions of seven justices, but for Justices Rehnquist and Burger);

(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i) The privilege of assistance of counsel;

(ii) The privilege of compulsory process;

(iii) The right to present evidence on his behalf;

(iv) The opportunity to choose half of the members of the sanity commission which evaluated him;

(v) The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi) The privilege to participate in an adversarial hearing;

(vii) The privilege to testify as a witness and be videotaped for posterity;

(viii) The right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix) The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by any party or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410

F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for executiononly while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.

The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the

stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illnessIbid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the

constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp. at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is

that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitious and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,

liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for ____ U.S. ____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication.⁶ The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) —can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

⁶ The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.

Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such requirements are unnecessary and unworkable. Without offering multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that it is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v. Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.

EAST BATON ROUGE PARISH
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day
of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: Rene Salomon
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Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public,
this 26 day of September, 1989.

Henry R. Jensen
NOTARY PUBLIC

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IN THE
SUPREME COURT OF LOUISIANA

NUMBER 89-KA-0159

MICHAEL OWEN PERRY
VERSUS
STATE OF LOUISIANA

STATE'S RESPONSE TO DEATH ROW INMATE'S
WRIT APPLICATION FOR SUPERVISORY AND REMEDIAL WRITS
FROM A POST-CONVICTION COMPETENCY RULING
OF THE NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
THE HONORABLE L. J. HYMEL, JR., JUDGE AD HOC PRESIDING
EAST BATON ROUGE DOCKET #9-85-472

DEATH PENALTY CASE

ORIGINAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA,
APPELLEE/RESPONDENT

SUPREME COURT
OF LOUISIANA

MAR 30 11 27 AM '89

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III. THE FORD STANDARD IS DESIGNED TO FURTHER THE PRIMARY PURPOSES OF THE DEATH PENALTY, WHICH MOST COMMENTATORS AGREE ARE RETRIBUTION AND DETERRENCE. AT THE SAME TIME, THE STANDARD RECOGNIZES THE DEATH ROW INMATE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND UNDER LA. CON. ART. 1, §20.	24
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B. <u>Applying the Ford standard of competency to the case at bar did not violate the petitioner's rights under the Fourteenth Amendment. By using the Ford standard, Louisiana has fulfilled its promises under Allen and ex rel Paine not to execute the insane.</u>	26
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B. <u>Petitioner understands that he faces the death penalty because he murdered five members of his family, and he knows he will die if electrocuted.</u>	31
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V. INMATE'S COUNSEL HAS ARGUED TO THIS HONORABLE COURT THAT HIS CLIENT IS INCOMPETENT UNDER ANY STANDARD BECAUSE HE IS MENTALLY ILL. THIS ARGUMENT DEFIES THE JURISPRUDENCE OF THIS STATE WHICH HOLDS THAT MENTAL ILLNESS ALONE IS NOT SUFFICIENT IN AND OF ITSELF TO ESTABLISH MENTAL INCAPACITY TO BE EXECUTED. INMATE HAS ALSO FAILED TO CARRY HIS BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE.	47

A. The inmate suffers from the same mental illness today as he did prior to his trial and conviction. Mental illness did not prevent the petitioner's trial, conviction and sentence to death; it will not prevent his execution

47

B. The petitioner's counsel argues his client is "ambivalent" and hence is incompetent to be executed. Inmate's earlier ambivalence -- at times confessing to the murders, at times denying them -- did not prevent a 12-member jury of his peers from unanimously imposing a sentence of death. Hence, ambivalence is not a bar to execution.

52

C. The counsel for the inmate has misinterpreted the doctors' analogy to a "moving target." Experts testify that the inmate does respond to medication.

53

D. Petitioner's counsel argues his client is incompetent to be executed because HE doesn't know HE is sentenced to die. Petitioner's own actions and expert testimony, however, prove the petitioner is very much aware of his impending fate.

58

E. The inmate's evidence is duplicitous, unreliable, biased, misleading or self-serving, and thus, is insufficient to prove by a preponderance that the petitioner has become insane subsequent to conviction.

59

VI. INMATE'S COUNSEL ARGUES THAT LA. C.C.R.P. ART. 641 IS THE STANDARD OF COMPETENCY TO BE EXECUTED IN LOUISIANA. THUS, UNLESS THE PETITIONER CAN UNDERSTAND THE PROCEEDINGS AGAINST HIM AND ASSIST IN HIS DEFENSE, HE IS INCOMPETENT TO BE EXECUTED. THIS ARGUMENT, HOWEVER, IS CONTRARY TO THIS STATE'S POSITIVE LAW AND JURISPRUDENCE.

66

A. The Louisiana State Legislature has never made a conscious choice to use art. 641 as the test of competency to be executed. This Honorable Court has also deferred to the State Legislature in drafting standards of competency

66

B. Louisiana's jurisprudence has only applied art. 641 in a post-conviction proceeding to determine whether a defendant was competent for trial, not whether he was competent for execution.

80

C. The purpose behind art. 641 is to guarantee a defendant his constitutional right to a fair and impartial trial. Because a death row inmate claiming insanity as a bar to execution has already been given a fair and impartial trial, applying art. 641 as the standard post-conviction defeats the state's interest in finality.

84

D. The trial court did not violate the petitioner's due process rights by applying the Ford standard instead of art. 641 as the standard of competency to be executed. Louisiana has not vested a state-right entitlement in a death row inmate by adopting art. 641 for a pre-trial proceeding.

85

111

VII. THE FORD STANDARD IS DUAL PRONG: BY ADOPTING ART. 641, THIS NEW STANDARD WOULD SUBSUME THE FORD STANDARD PLUS ADD A THIRD PRONG OF REQUIRING A CAPACITY BY THE CONDEMNED INMATE TO ASSIST IN HIS DEFENSE. ASSUMING ARGUENDO THAT THIS HONORABLE COURT WOULD ADOPT ART. 641 AS THE STANDARD TO DETERMINE COMPETENCY FOR EXECUTION, THE STATE RESPECTFULLY SUBMITS THAT ANY ADDITIONAL SAFEGUARDS ARE OUTWEIGHED BY THE STATE'S INTEREST IN FINALITY.

87

A. The Ford dual-prong standard is the equivalent of the first element of art. 641, which requires the defendant to "understand the proceedings against him."

87

B. The second element of art. 641 requires that the defendant have the capacity to "assist in his defense." The State respectfully submits that this second element is unnecessary in a post-conviction proceeding because the issue of guilt or innocence has already been resolved. The question of the petitioner's execution is not IF, but WHEN.

89

VIII. ALTERNATIVELY, IF THIS HONORABLE COURT WOULD RULE THAT ART. 641 IS THE STANDARD OF COMPETENCY FOR EXECUTION IN LOUISIANA, THE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT, BECAUSE OF HIS MENTAL ILLNESS, HE HAS BECOME INCOMPETENT SUBSEQUENT TO CONVICTION. EVIDENCE TO THIS POINT CLEARLY SUPPORTS A FINDING THAT THE PETITIONER UNDERSTANDS THE PROCEEDINGS AGAINST HIM AND THAT HE IS ABLE TO ASSIST IN HIS DEFENSE.

98

A. Under art. 641, the petitioner must prove it is more probable than not that he is incapable, because of his mental illness, of assisting in his defense. Petitioner's stagnant medical diagnosis and stale evidence proves only that his competency is unchanged.

99

B. The "Bennett" test, while in part is clearly irrelevant to determine competency for execution, is flexible, especially if abuse of the criminal justice system is shown.

100

C. In the case at bar, petitioner's assisting in his defense is best shown by his own words and actions. Considering the relevant questions "Bennett" asked in regard to art. 641's second element of assisting in his defense, the petitioner is competent to be executed.

104

D. Opposing counsel has attempted to manipulate the criminal justice system by ordering the petitioner to forego medication in spite of their knowledge that the petitioner responds favorably to medication. Now those same attorneys want to benefit from that order by petitioning this Honorable Court to find that their client cannot assist in his defense.

111

E. Alternatively, if this Honorable Court decides the petitioner is incapable of assisting in his defense, the State contends that petitioner is not incapable, but rather has refused to assist in his defense by voluntarily withdrawing his medication. Art. 641's underlying presumption is that "incapacity" must be beyond the defendant's control.

113

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STATEMENT OF THE CASE

Michael Owen Perry stands before this Honorable Court appealing the judgment of the Nineteenth Judicial District Court of East Baton Rouge Parish, the Honorable Judge L. J. Hymel, Jr., presiding, which determined that Perry is competent to be executed and that he can be treated without his consent so that competence can be maintained. (R. p. 0005).

The roots of this odyssey into Michael Owen Perry's competence to proceed to execution took hold in the opinion rendered by this Honorable Court in affirming Perry's conviction for the murders of his father, Chester; his mother, Grace; his cousins, Randy and Brian; and his two-year-old nephew, Anthony. State v. Perry, 502 So.2d 543 (La. 1986). In the opinion, this Court stated that "[w]e have determined the defendant was capable of proceeding to trial. A similar review might be in order prior to execution." Perry, at 564.

Upon denial of Perry's petitions for writ of certiorari and for rehearing by the United States Supreme Court, Perry v. Louisiana, 108 S.Ct. 205 (1987); Perry v. Louisiana, 108 S.Ct. 511 (1987), the trial court, in accordance with the guidance given by this Honorable Court, appointed a sanity commission on January 21, 1988 to determine the present competence of Perry. (R. p. 0002). The court appointed three psychiatrists; Drs. Theresita Jimenez, Aris Cox, and Glen Estes and one psychologist, Dr. Curtis Vincent to the sanity commission. (R. p. 0002). Pursuant to these appointments, each commission member was to examine Perry prior to a hearing set for April 20, 1988.

The trial court also appointed Keith Nordyke as Perry's representative in this competency proceeding. (R. p. 0002). This appointment authorized Nordyke to make decisions on Perry's behalf as deemed necessary and within Perry's best interests. (R. p. 0002). These motions were filed ex parte and sealed in the record at Nordyke's request. (R. p. 0002).

At the hearing of April 20, 1988, testimony was taken from each member of the sanity commission. The court, defense counsel, and the State each had the opportunity to examine and cross-examine each member of the commission. (R. p. 0496-0695).

At this hearing, Perry was given the opportunity to introduce six volumes of medical records, which included records of Perry's pre-trial confinement. It is also important to note that these records were inclusive only through January of 1988. (R. pp. 0539-0546). Counsel for Perry was also allowed to videotape Perry through the entirety of the hearing. (R. pp. 0502-0503).

The trial court originally set its ruling for May 26, 1988, yet reassigned its ruling date to August 26, 1988. (R. pp. 0002-0003).

On August 26, 1988, the court vacated and set aside its previous order appointing Nordyke as the person having authority to make decisions for Perry. (R. p. 0003). The court further ordered Drs. Cox and Jimenez to re-examine Perry relative to his competence to proceed to execution. (R. p. 0003). The court ordered Drs. Cox and Jimenez to appear on September 30, 1988 to testify concerning these new examinations. (R. p. 0003).

At this time, the court also ordered Perry treated and medicated as deemed appropriate by the Department of Corrections medical staff until the time when a final determination of Perry's competence would be rendered by the court. (R. p. 0307).

Upon Perry's seeking a stay order, this Honorable Court stayed the trial court's order of August 26th ordering treatment until a determination on the issue of competence was rendered. (R. p. 0305). This Honorable Court went on to deny Perry's request for a stay of the September 30th hearing. (R. p. 0314).

At the September 30th hearing, in order to gather as much information as possible before rendering a decision on Perry's competence to proceed, the court called Drs. Cox, Jimenez and Kovac to testify. (R. p. 0712). Testimony was taken from Drs. Cox and Kovac, with the court, Perry's counsel, and the State each having an opportunity to examine and cross-examine each witness. (R. pp. 0706-0748). Dr. Jimenez was unable to testify at this time due to illness; therefore, the court continued the matter until October 21, 1988 for additional testimony and a ruling. (R. p. 0004; 0712).

On October 21, Dr. Jimenez testified as to her examination of Perry as ordered by the trial court. The court, Perry's counsel, and the State were each given the opportunity to examine and cross-examine Dr. Jimenez. (R. pp. 0752-0761). At the close of Dr. Jimenez's testimony, the trial court gave Perry and the State an opportunity to present any other evidence, or call any other witnesses, that may have provided relevant evidence to the court's determination. (R. pp. 0761-0762). Having given the parties this opportunity, and having been offered no new evidence or witnesses, the court considered the matter submitted. (R. p. 0762).

Having considered the evidence submitted, the court rendered a determination finding Michael Owen Perry competent to proceed to execution. (R. p. 0791). The trial court further ordered that the Department of Corrections' medical staff was to treat Perry, through the use of their sound professional judgment, so that his competence to proceed to execution could be maintained. (R. p. 0792).

Michael Owen Perry now appeals this judgment and attendant orders of the trial court. The State asserts that the judgment and orders of the trial court are correct and should be affirmed.

SUMMARY OF ARGUMENT

1. The State respectfully submits that the standard of competency in Louisiana is whether the condemned inmate knows of his impending death and the reason for it. The petitioner now before this Honorable Court is presumed sane. Therefore, to win a stay of execution, Michael Owen Perry must prove by a preponderance of the evidence that he has become insane subsequent to his conviction for five counts of first-degree murder. However, the record clearly shows that he has failed to rebut by a preponderance that sanity presumption. Michael Owen Perry knows of his impending death and the reason for it. Under the jurisprudence of this state and this nation, the State of Louisiana is free to impose a sentence of death upon the petitioner.

2. Louisiana's standard of competency for execution was first enunciated by Justice Lewis Powell in Ford v. Wainwright. The purpose of this standard is to define the type of insanity necessary before an execution must be stayed under the Eighth Amendment. The Ford standard - requiring the death row murderer know he will die for the crimes he committed - is the prevailing standard of all states that have adopted a death penalty. Louisiana has adopted this standard implicitly in its jurisprudence.

3. In addition to guaranteeing a condemned prisoner's rights under the Eighth and Fourteenth amendments and La. Const. art. 1 §20, the Ford standard serves the deterrent and retributive purposes of the death penalty. By adopting the Ford standard, Louisiana has fulfilled its jurisprudential promise to Michael Owen Perry not to execute him while he is insane.

4. The trial court's ruling that the petitioner is presently competent for execution because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment" is correct. Both the petitioner's own words and actions as well as expert testimony show that Michael Owen Perry understands the death penalty and knows why he is being forced to forfeit his life. Following this State's jurisprudence, the trial court appropriately focused on the petitioner's present condition independent of his mental illness or future medical needs.

5. Evidence submitted in the petitioner's brief fails to meet his burden of proof. The petitioner's argument that mental illness alone regardless of a standard of competency is sufficient to stay his execution is erroneous. Ambivalence is also not the test of incompetency for execution. Any reference to a "moving target" can be countered with expert testimony that petitioner's condition only improves with medication - a regime that petitioner's counsel has deliberately interrupted as a means to induce incompetency. Finally, opposing counsel's contention that Michael Owen Perry doesn't know HE is scheduled to die has been discredited with their client's own words and actions.

6. Opposing counsel is insisting that La. C.Cr.P. art. 641 is the test of competency for execution in Louisiana. This argument defies the legislative history, framers' intent, and the jurisprudence of this State. Art. 641 has never been applied as the test of competency for execution. Its purpose is to guarantee a defendant an impartial and fair trial. Hence, the application of art. 641 to the petitioner as a stay for execution defeats the State's compelling interest in finality because the petitioner has already had a fair and impartial trial. Because Louisiana has never vested the art. 641 standard in a death row inmate, the application of the Ford standard to the petitioner did not violate his 14th Amendment right.

7. The art. 641 element to "understand the proceedings" is encompassed within the Ford standard. Art. 641's second element of "assisting in his defense" is unnecessary in a post-conviction proceeding to stay execution. The additional safeguard is outweighed by the State's interests of finality and avoiding spurious claims as loopholes to execution. At this point in a condemned inmate's criminal prosecution, the question is not WHETHER he will be executed; the question is WHEN will he be executed.

8. If this Honorable Court were to rule that art. 641 is the standard of competency for execution in Louisiana, the State respectfully submits that the petitioner understands the proceedings against him and is capable of assisting in his defense. If this Court would rule Michael Owen Perry is incapable of assisting in his defense, the State respectfully suggests that the petitioner has REFUSED to assist in his defense by withdrawing from medication. The petitioner and his

counsel have attempted to manipulate the criminal justice system by abruptly halting all medication against medical advice and requesting counsel to be both medical and legal advisor. Art. 641 presumes that the "incapacity" is beyond the claimant's control; otherwise, the standard is at the mercy of the claimant.

9. Michael Owen Perry alleges that the trial court incorrectly found him competent to proceed to execution, because he was medicated at the time of judgment. The State contends that the trial court's determination of competence was a valid determination of Perry's present condition. Having determined the applicable standard of competence to proceed to execution in Louisiana being that Perry understand the death penalty and the reason for it, the trial court validly found Perry competent. It is irrelevant to this determination of competence whether the condition has been achieved or is maintained by treatment. The State asserts that Louisiana jurisprudence clearly recognizes that a determination of competence must be based on the individual's present condition only. This line of jurisprudence recognizes that competence maintained through treatment is valid competence to proceed to trial or to execution.

10. Michael Owen Perry asserts the trial court's ordering treatment was invalid as violative of State statutory and Federal Constitutional law. The State asserts that the trial court's order of treatment is valid, as consistent with both State and Federal requirements regarding treatment of death row inmates without their consent. The court's order of treatment is consistent with all state law dealing with competency determinations, deeming an assertion of incompetence acts as a submission to treatment, if treatment is necessary to achieving or maintaining competence. The order is also within the inherent power vested in courts by state law for administering the criminal justice system. In light of the intertwined nature of questions regarding competency and treatment, Federal law also requires that an individual submit to treatment if deemed necessary, or waive any objection to forcible treatment by asserting and proving incompetence. Competence maintained through treatment is valid under State law for an individual to proceed. State jurisprudence has affirmed medically maintained competence as valid to proceed to trial or to be released on probation. The same reasoning also mandates that medically maintained competence is valid so as to

allow a death row inmate to proceed to execution. Finally, the treatment order is not violative of any Constitutional rights or privileges possessed or maintained by Perry. The treatment order comports with procedural due process because it is subsumed within the protections afforded the competency determination. The order also comports with all other applicable Constitutional provisions, as satisfying the State's obligation to treat those in its custody and allowing Perry the ability to exercise his Constitutional privileges.

11. Inmate Perry claims that his hearing on competency failed to meet constitutional standards. We respectfully submit that the trial court's conduct of the hearing surpassed constitutional requirements. The Ford Court established guideposts in determining the procedures which must accompany the inquiry into competency. Perry was afforded procedural protections greater than the requirements of Ford. He was afforded the assistance of counsel; compulsory process; a right to present evidence; a right to choose sanity commission members; a right to impeach the experts' opinions; the privilege of an adversarial hearing; a video-taping of his testimony; an independent decisionmaker; and judicial review. The inmate's claims of trial court errors during the competency hearing lack merit.

INTRODUCTION

Counsel for the inmate has appealed to this Honorable Court with emotional arguments that are unsupported by the laws of this state and this nation. For example, opposing counsel argued at length that "killing the insane is unconstitutional." (Pet.'s Brief, p. 25).

First, this point is moot; the United States Supreme Court settled this issue almost three years ago when it held in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) that the Eighth Amendment prohibited the execution of the insane. Prior to that time, all states recognized, either by statute or jurisprudentially, the common law prohibition against executing the insane.

Second, the State has no intention of executing an insane man, or as the opposing counsel describes it: "dragging a shaved prisoner to his death when that prisoner is delusional..." (Pet.'s Brief, pp. 26-27.) The question here is to determine the petitioner's mental competency for execution. Hence, opposing counsel's emotional arguments are a smoke screen; their main objective is to elicit emotion, confuse and mislead.

In contrast, the State has chosen to base its arguments on well-reasoned and logical premises of law. The State's legitimate interests in finality and protecting the criminal justice system from abuse and manipulation must be recognized. However, this is not to forget what has brought us to this point today. Like the petitioner's counsel, the State could just as easily flare emotions by considering the reason why this petitioner is on death row. Michael Owen Perry was the judge, jury and executioner of five innocent people; he carefully planned and carried out the murders of his parents, his 2-year-old nephew and his two cousins in the privacy of their homes. This proceeding today is just another step toward the imposition of a lawfully imposed sentence of death. The State owes a duty to its citizens to seek retribution from this condemned inmate. As Mr. Justice Stewart wrote in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976):

"In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to

many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs...."

"...Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 96 S.Ct. at 2930.

Of course, the State's position here is not as an advocate of the death penalty. That choice was made by the State Legislature when it passed La. R.S. 14:30. However, the State does intend to argue before this Honorable Court that the petitioner, Michael Owen Perry, is competent for execution, and that he has not become insane subsequent to his conviction on October 31, 1985. Inmate Perry is mentally capable of understanding that he will forfeit his life in exchange for those lives he so violently extinguished on the peaceful morning of July 17, 1983.

1. LOUISIANA LAW PROVIDES THAT THE STANDARD OF COMPETENCY TO BE EXECUTED IS WHETHER THE CONDEMNED PRISONER UNDERSTANDS THE DEATH PENALTY AND REASON FOR IT; ONCE A VALID DEATH SENTENCE IS IMPOSED, THE DEATH ROW INMATE IS PRESUMED SANE; AND TO REBUT THAT PRESUMPTION, THE CONDEMNED PRISONER MUST SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAS BECOME INSANE SUBSEQUENT TO HIS CONVICTION.

The State is asking this Honorable Court to unequivocally rule that the standard of competency for executing a death row inmate in Louisiana is the standard applied by the trial court to the case at bar; that is, whether the condemned inmate understands the death penalty and knows the reason he is forfeiting his life. Because of the absence of state positive law pertaining to a post-conviction standard of competency to be executed, the trial court focused on the controlling and relevant jurisprudence, most importantly, *Ford*, supra, and *Lowenfield v. Butler*, 843 F.2d 193 (5th Cir. 1988). The State is asking that the trial court's ruling be affirmed on appeal.

A. Relying on this State's jurisprudence, the trial court was correct in holding that the petitioner, condemned murderer Michael Owen Perry, is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment."

On October 21, 1988, the trial court ruled that the petitioner, death row inmate Michael Owen Perry, is competent for execution. The judge wrote:

"The test for competency for execution in Louisiana appears to come from the *Ford* and *Lowenfield* decisions, which set forth a two-pronged test for competency for execution. Under this test, which this Court hereby (sic) adopts, the State is prohibited from executing those who are unaware of the punishment they are about to suffer and why they are to suffer it." (R. pp. 0784-85; emphasis supplied).

The trial court then went on to hold:

"From the testimony adduced, and from the *Ford* and *Lowenfield* tests, it is obvious to this Court that the defendant is competent for execution." (R., p. 0789; emphasis supplied).

The trial court concluded its opinion by saying:

'For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. (R., p. 0791; emphasis supplied).

In short, the trial court's standard of competency to be executed is correct for two reasons: First, neither the State Legislature nor the state circuit courts have addressed the issue of what standard of competency is required by Louisiana prior to the execution of a death row inmate. Since the decision in *Ford*, supra, three years ago, the State Legislature has not acted to positively prescribe a standard by which to test competency claims of death row inmates. The State concedes a standard of insanity in the context of a post-conviction stay of execution could be more expansive than the one applied to the case at bar. Even Mr. Justice Lewis Powell, who first enunciated the *Ford* standard adopted by the trial court, admitted the standard is de minimus. In other words, the standard is a line below which the states could not drop without violating the inmate's Eighth Amendment right not to be executed while insane.

"Under the circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum." *Ford*, 106 S.Ct. at 2608, footnote 3.

Simply put, Louisiana has not adopted a broader definition of insanity applicable to determining a death row inmate's post-conviction competency for execution. Absent legislative action, the standard enunciated by Justice Powell should control. Therefore, the trial court was correct in applying the *Ford* standard.

The second reason the trial court was correct to apply the *Ford* standard is that the standard has been implicitly recognized in this State's jurisprudence.

The United States Court of Appeal, Fifth Circuit, in *Lowenfield*, supra, denied a writ of habeas corpus to condemned

murderer Leslie Lowenfield, a Louisiana inmate who has since been executed. Citing the Ford standard in dicta, the court held that the inmate Lowenfield had failed to make a "substantial threshold showing" that he presently lacked the mental capacity required for execution, and therefore, his request for a hearing was denied. Lowenfield, 843 F.2d at 187-188.

The Lowenfield court cited Ford as holding that the Eighth Amendment prohibits the execution of the insane. As authority for its denying Lowenfield a hearing, the Lowenfield court cited first Justice Marshall and then Justice Powell's concurring opinion in Ford in great detail:

"Justice Marshall, in his plurality opinion, gives us some insight into the type of mental disorder a prisoner must suffer to be afforded this protection. Justice Marshall suggests that this relief depends on whether the prisoner 'comprehend[s] the nature of the penalty' and whether the prisoner's mental illness 'prevents him from comprehending the reasons for the penalty or its implications.'" Ford, 477 U.S. at 399, 106 S.Ct. at 2595, 91 L.Ed.2d at 335.

The Lowenfield court then cited the standard Justice Powell articulated:

"If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for this passing. Accordingly, I would hold that the Eighth Amendment forbids execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 477 U.S. at 422, 106 S.Ct. at 2608-09, 91 L.Ed.2d at 354 (Powell, J., concurring in the judgment.)

After finding that "Dr. Zimmerman's affidavit does not present the substantial threshold showing that Lowenfield falls within the above-defined class of mentally deranged prisoners so that due process requires that he be afforded a hearing," the Lowenfield court again cited Ford. Lowenfield, 843 F.2d at 187.

"In order to have been convicted and sentenced, petitioner must have been judged competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The State therefore may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process." Ford, 477 U.S. at 26, 106

S.Ct. at 2610, 91 L.Ed.2d at 356-57 (Powell, J., concurring in the judgment).

Dicta in other jurisprudence supports the trial court's decision as well. In the case involving this same petitioner where his conviction and sentence were affirmed on appeal, this Honorable Court in State v. Perry, 502 So.2d 543 (La. 1986) stated:

"The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and LACKS THE CAPACITY TO UNDERSTAND THE DEATH PENALTY. (Emphasis supplied)..."

"...Defendant's burden is to show by a preponderance of evidence that he LACKS THE PRESENT CAPACITY TO UNDERGO EXECUTION." Perry, 502 So.2d at 564. (Emphasis supplied).

The Perry court cited State v. Allen, 204 La. 513, 15 So.2d 870 (La. 1943) for the proposition that the State would not execute an inmate who has become insane subsequent to conviction for a capital crime. The court also cited Ford, supra, as authority that no state imposes the death penalty on the insane.

In Allen, the Louisiana Supreme Court 45 years ago held that the relator, a condemned murderer who claimed post-conviction insanity, was not entitled to a hearing on the issue of his mental capacity because he had not shown a reasonable ground to believe he had become insane subsequent to conviction. Therefore, the court reasoned, the trial court's refusal to appoint a lunacy commission was not an abuse of discretion. In Allen, however, the court did not directly address the issue of what the law would require as a standard of competency to be executed. Because the relator never passed the threshold requirement to obtain a hearing, the Allen court never reached this question. However, the Allen court described how the relator's counsel had stated his client's case:

"Counsel alleged in his application that he could prove by the sheriff, the coroner, the jailer and a certain named inmate of the jail that relator was then insane and INCAPABLE OF UNDERSTANDING THE PROCEEDINGS AGAINST HIM." (Emphasis supplied), Allen, 15 So.2d at 871.

From this review of the jurisprudence, Allen, Perry and Lowenfield all speak in terms of the condemned murderer

understanding the death penalty and reasons for it, which is the same test enunciated in Ford, supra, and adopted by the trial court. The Perry and Lowenfield decisions are particularly persuasive since the Perry court used Ford-like language and the Lowenfield court actually utilized the Ford standard, both subsequent to the Ford decision. Hence, the trial court was correct to interpret the state's jurisprudence as implicitly recognizing the standard of competency required by Ford, especially considering that the State Legislature had not yet addressed the issue.

Therefore, lacking any positive law or other jurisprudence, the trial court was correct to follow Ford, Lowenfield, Perry and Allen. For these reasons, the trial court's finding on October 21, 1988 must be affirmed. Under the Louisiana jurisprudence that has implicitly embraced the Ford standard, the petitioner is competent to be executed because he understands the death penalty and the reason for it.

B. The petitioner was found competent to stand trial and was determined sane at the commission of the crime. Under Louisiana law, he is presumed sane for execution, absent a showing by a preponderance of the evidence that he has become insane subsequent to his conviction.

The trial court's ruling was based on its own motion in the petitioner's behalf claiming that he had become insane subsequent to conviction. To inquire into the issue, the trial court appointed a sanity commission composed of three psychiatrists, Drs. Theresita G. Jimenez, Aris Cox and Glen Estes, and one psychologist, Dr. Curtis M. Vincent. Subsequently, hearings were held April 20, September 30 and October 21, 1988. From this process, the trial court concluded that the petitioner was competent to be executed because he presently comprehends the fact of his impending death, and understands why he is to be executed.

Under Louisiana law, the petitioner is presumed sane. La. R.S. 15:432 (West 1989). In Perry, supra, this Honorable Court stated that the State would not impose the death penalty if a court determined that the petitioner had become insane subsequent to his conviction. However, the petitioner would be required to carry that burden by a preponderance of the evidence. Perry, 502 S.2d at 565. Hence, the petitioner must

prove that it is more probable than not that he has become insane subsequent to his sentencing on December 19, 1985. The issue before this Honorable Court is the petitioner's PRESENT mental capacity to proceed to execution. Perry, 502 S.2d at 564.

This presumption of sanity should also be viewed in the context of this petitioner's background. During the course of his trial on five counts of first-degree murder, this same petitioner's prior sanity claims were rejected. He is now under a legally imposed sentence of death. A 12-member jury of the petitioner's peers unanimously decided during the penalty phase that the petitioner was sane at the time of commission of the crime, and, rejected any mitigating evidence of mental illness by unanimously imposing a sentence of death. Prior to trial, two sanity commissions were empaneled to review Perry's ability to assist in his defense and/or understanding of the proceedings against him. Two hearings with expert testimony were conducted, respectively on September 26, 1983 and March 1, 1985. The experts at the 1983 hearing concluded that Perry had a history of mental illness and that he was in need of further psychiatric evaluation before proceeding to trial. Each expert expressly reserved his opinion on Perry's particular mental status in 1983. In 1985, the several experts concluded that the petitioner was competent to stand trial because he understood the nature of the proceedings and was capable of assisting in his defense. The petitioner's conviction and sentence were affirmed on appeal by this Honorable Court. Perry supra. The petitioner's direct appellate review ended when the U.S. Supreme Court denied writs on October 5, and December 14, 1987. Perry v. Louisiana, 108 S.Ct. 205 (1987), cert.den., 108 S.Ct. 511 (1987), reh. den.

Because the issue of sanity has been addressed before, these prior findings that the petitioner is sane are worthy of a presumption of correctness. When this Honorable Court addresses the issue of the petitioner's present mental capacity, weight should be given to the fact that this petitioner twice before raised the same issue, and twice before lost. Hence, absent any new evidence that insanity has arisen subsequent to conviction, the result should be the same. The petitioner is competent for execution because he understands the death penalty and the reason for it.

C. Jurisprudence prohibits the petitioner from using pre-conviction evidence of mental illness to carry his burden of proving post-conviction insanity. At issue is the petitioner's PRESENT mental capacity to proceed to execution.

The petitioner must show by a preponderance of the evidence that he has become insane SUBSEQUENT to his conviction. Because the issue is now PRESENT capacity to be executed, Louisiana jurisprudence prohibits a court from considering pre-conviction evidence of mental illness to decide an issue of post-conviction competency for execution. The critical time period to determine the issue of PRESENT capacity for this petitioner is between January 20, 1988 and October 21, 1988.

Almost 92 years ago, the Louisiana Supreme Court in State ex rel. Paine v. Potts, 49 La. Ann. 1500, 22 So. 738 (La. 1897) recognized that when a defendant has raised a question of his competency prior to trial, and that issue is resolved, the issue will not be reopened and litigated again absent evidence that insanity has occurred subsequent to trial. The relator in this case was seeking a writ of mandamus to require a hearing. The relator's mental condition has been addressed by both the jury and the judge before and during the trial. The trial court subsequently denied relator's post-conviction application for a hearing. That decision was upheld on appeal because the relator had not claimed his insanity has arisen subsequent to his trial.

"Here counsel for the defendant seek to reopen issues which were considered and passed upon in the trial of the case. We agree with the district judge. Those issues to the date of the conviction are now closed. In the application for the interdiction the insanity of the defendant is alleged, without specially averring whether it is based upon conduct and utterances of the defendant since the trial, or prior to the trial. It is well settled that, if one who has committed a capital offense becomes non compose mentis after conviction, he shall not be executed. But the burden was upon the defense to specially allege that the insanity had developed and become evident since trial..."

"...All allegations setting forth defendant's mental condition, having reference to a date prior to conviction, do not present an issue for decision. The allegations made do not, in our view, refer to acts of insanity since the conviction." ex rel Paine, 22 So. at 739.

Ex rel Paine was reaffirmed almost a half century later in State v. Miquet, 194 La. 1081, 195 So. 545 (La. 1940), when the Louisiana Supreme Court denied writs of certiorari and mandamus to a condemned murderer who was claiming he was insane subsequent to conviction, and therefore, could not be executed. Like ex rel Paine, the court again rejected the inmate's claim because he had produced no new evidence subsequent to his conviction that he had become insane. These courts were consistent in that evidence of the defendant's mental capacity prior to conviction should not be at issue on the defendant's present claim that he had become insane subsequent to conviction.

Based on the authority of ex rel Paine and Miquet, the State contends that the evidence submitted by this petitioner has failed to establish by a preponderance that he has become insane subsequent to conviction, and therefore the presumption of sanity still stands. The evidence presented to the trial court was either duplicitious of earlier evidence presented by the petitioner's counsel prior to conviction, or showed no significant change in petitioner's mental condition subsequent to his conviction.

While this court is prohibited from resting its decision on evidence that existed prior to conviction, that evidence, however, clearly provides this Court with a point of reference. Without question, this petitioner has a history of mental illness, dating back to at least 1981, some two years before the murders. The petitioner is also smart enough to malingering and smart enough to manipulate the criminal justice system. Most importantly, this mental illness did not prevent the petitioner's conviction and sentence. It should not stay his execution, absent a showing by a preponderance of the evidence that his mental illness has deteriorated to the point of legal insanity. The State contends that the evidence clearly indicates that the petitioner is the same today as he was pre-trial, and therefore his condition remains unchanged. The evidence further shows that the petitioner satisfies the legal test of competency to be executed: He is aware of his impending death and the reason for it.

In conclusion, the petitioner has failed in his burden of proof, and therefore, the trial court ruling on October 21, 1988 must be affirmed.

II. LOUISIANA'S STANDARD OF COMPETENCY TO BE EXECUTED WAS FIRST ENUNCIATED ALMOST THREE YEARS AGO IN UNITED STATES SUPREME COURT JUSTICE LEWIS POWELL'S CONCURRING OPINION TO FORD V. MAINWRIGHT. IF A DEATH ROW INMATE KNOWS OF HIS IMPENDING DEATH AND THE REASON FOR IT, THE STATES ARE FREE TO IMPOSE THE SENTENCE OF DEATH.

For the first time, the United States Supreme Court in Ford, supra, recognized an Eighth Amendment right not to be executed while insane. But while the States would be prohibited from executing insane inmates, they were not told by a clear majority what the standard of competency to be executed would be. Subsequently, any post-Ford analysis rests heavily on Justice Lewis Powell's concurring opinion, where, for the first time, the issue was directly addressed.

A. Justice Powell's two-prong test defines sanity in the context in which it arises, that is, subsequent to conviction.

Mr. Justice Powell stated in Ford that he wrote his concurring opinion to address two issues: "(i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of de novo review in federal courts under 28 U.S.C. §2254(d)." He explained: "The Court's opinion does not address the first of these issues, and as to the second, my views differ substantially from Justice Marshall's. I therefore write separately." Ford, 106 S.Ct. at 2606-07.

Justice Powell had joined only Parts I and II of Justice Marshall's plurality opinion, in which Justice Marshall was joined by Justices Brennan, Blackmun and Stevens. Justice Powell agreed with the plurality that executing an insane prisoner was cruel and unusual punishment under the Eighth Amendment. While Justice Marshall said the States would be prohibited under the Eighth Amendment from executing the insane, his plurality opinion left open the issue of how a state was to determine when a prisoner's mental incapacity was sufficient to stay his execution. Justice Marshall wrote:

"We leave to the States the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." Ford, 106 S.Ct. at 2606.

Justice Powell, however, explained in great detail what "mental awareness" the Eighth Amendment would require as a prerequisite to execution. He summarized his position as follows:

"If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 106 S.Ct. at 2608.

While states were left free to pass more expansive standards, Justice Powell enunciated the constitutional minimum. Justice Powell's test is essentially two-pronged: first, the death row inmate must know the fact of his impending death; second, the inmate must know the reason for it. If this test is met, the states are then free to execute the inmate.

Support for Justice Powell's standard is also found in Justice Marshall's plurality opinion. While Justices Powell and Marshall hold different views as to the procedural safeguards needed to protect an insane inmate's substantive right under the Eighth Amendment, they speak in similar terms as to the standard. In dicta concerning procedural safeguards, Justice Marshall stated:

"Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the 'evidence' will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that 'evidence' be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ABILITY TO COMPREHEND THE NATURE OF THE PENALTY. Fidelity to these principles is the solemn obligation of a civilized society."

"Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from COMPREHENDING THE REASONS FOR THE PENALTY OR ITS IMPLICATIONS." Ford, 106 S.Ct. at 2606. (Emphasis supplied).

Most recently, Justices Marshall and Brennan, both well-known, adamant opponents of the death penalty, referred to Justice Powell's standard in their dissenting opinion in Johnson v. Cabana, 107 S.Ct. 2207 (1987). The majority had denied the petitioner's application for a stay of execution and his petition for a writ of certiorari. Arguing that the application for a stay and the petition for certiorari should be granted, Justice Brennan, with whom Justice Marshall joined, wrote the dissenting opinion.

Justice Brennan stated that the petitioner had raised a substantial claim that he had become insane subsequent to his conviction, and therefore, under Ford, could not be subjected to execution. Justice Brennan then cited Justice Powell's concurring opinion in Ford as establishing a two-prong test.

Hence, the three justices appear to agree on the definition of insanity in the context of staying a death row inmate's execution. Justices Powell, Marshall and Brennan all require that the condemned prisoner know of his impending death, so he can prepare mentally for its occurrence. They also require that the condemned prisoner know why he is being executed, so that the retributive value of the death penalty is served.

This Honorable Court will find that the evidence clearly shows that the petitioner, Michael Owen Perry, is aware of his impending death, and therefore, society is affording him an opportunity to prepare himself. The petitioner is also aware that he is being electrocuted because he murdered five members of his family. Therefore, under the authority of Ford, the petitioner is legally competent to be executed, and the State may impose the penalty of death.

B. The standard announced by Justice Powell in Ford is the prevailing standard used by the states that have adopted a death penalty.

As stated earlier, Justice Powell was well aware that the standard he held was necessary under the Eighth Amendment was a minimal standard, and he reminded state legislators that they were free to pass statutes encompassing more expansive standards. However, Justice Powell suggested that the standard he proposed was one already recognized jurisprudentially in the majority of the states with a death penalty. In Ford, Florida

had by statute granted death row inmates a right not to be executed while insane. While the standard was basically the same standard as proposed by Justice Powell, the state's procedures for determining the inmate's competency were held constitutionally deficient. In a footnote, Justice Powell pointed out his standard was the one most favored:

"Moreover, other cases suggest that the prevailing test is 'whether the condemned man was aware of his conviction and the nature of his impending fate' - essentially the same test stated by Florida's statute." Ford, 106 S.Ct. at 2608.

Louisiana, therefore, has followed the majority rule on this issue. As Justice Powell pointed out at the time Ford was written, most states had not addressed the issue in their positive law, but had adopted the standard in their case law. Hence, by Louisiana implicitly recognizing the Ford standard in its jurisprudence, the state is following the majority trend.

C. The Ford standard is very similar to a standard recognized at common law. Prior to 1966, Louisiana's Code of Criminal Procedure required courts to supplement its criminal law with common law whenever gaps in the Code were found.

All states recognized the common law prohibition against executing the insane long before the Ford decision in 1986. In Louisiana's history, one of the earliest cases to address the issue was State ex rel. Armstrong v. Judge, 48 La. Ann. 503, 19 So. 475 (La. 1896). Although the 1943 Louisiana Supreme Court case of Allen, supra, is generally cited for the proposition that Louisiana will not execute an insane prisoner, by the time Allen was decided, that principal was already well established in Louisiana law. For instance, ex rel. Armstrong, just short of a century old, held that a convicted murderer sentenced to death by hanging was not entitled to jury trial on his post-conviction insanity claim. In that case, the judge had appointed a commission of three experts to examine the relator. Two ruled that the man was sane; the third expert said the relator was "affected with emotional insanity." Ex rel. Armstrong, 48 La. Ann. at 504. In 1897 the Louisiana Supreme Court in ex rel. Paine, supra, expressly stated:

"It is well settled that, if one who has committed a capital offense becomes non compose mentis after conviction, he shall not be executed." ex rel. Paine, 22 So. at 739.

So, while it is clear that Louisiana followed the common law prohibition against executing the insane, it is not clear what standard of competency the courts were applying. The State's research on a standard of competency for a post-conviction stay of execution failed to uncover any late 19th century or early 20th century case where the court discussed the standard that was applicable. While a series of cases discussed other related issues, such as whether the trial court abused its discretion in denying the condemned inmate a hearing, whether the condemned inmate was entitled to a jury trial, or whether evidence of pre-trial insanity could be reconsidered for post-trial insanity claims, no case was found that directly addressed the issue of what standard would be applied if the prisoner had met his threshold burden of proof.

However, Louisiana's Code of Criminal Procedure prior to 1966 required the courts to follow the common law to fill gaps in the law if no codal provisions was applicable. (See La. C.Cr.P. art. 3, (West 1989), Official Revision Comment.) This approach has since been abandoned with the adoption of La. C.Cr.P. art. 3. However, this would seem to indicate that prior to 1966, a Louisiana court was required by the Code to supplement procedural gaps by relying on the common law. Therefore, a Louisiana court would have been required by the Code to apply a common law competency standard provided that the State's positive law or jurisprudence had not addressed the issue.

The State's research also uncovered a common law standard of competency that is very close to the standard enunciated in Ford. LaFave & Scott point out that while the common law prohibition against executing the insane was well understood, the policy issues supporting the rule were muddled and confused. Despite the confusion, a standard of competency prior to execution was recognized. The commentators stated:

"It is the rule in all jurisdictions that a sentence of execution cannot be carried out if the prisoner is insane at the time set for execution. The common law was quite vague on the meaning of insanity in this context, but it is unusually taken to mean that the defendant cannot be executed if he is UNWARE OF THE FACT THAT HE HAS BEEN CONVICTED AND THAT HE IS TO BE EXECUTED. Stated another way, he must be so unsound mentally 'AS TO BE INCAPABLE OF UNDERSTANDING THE NATURE AND PURPOSE OF THE PUNISHMENT ABOUT TO BE EXECUTED UPON HIM.' Whether this is a correct or complete statement of the rule remains somewhat unclear because of continuing uncertainty about the reasons underlying it." LaFave & Scott, 4:39 at 302-03 (Emphasis supplied.)

Therefore, after adopting the common law rule prohibiting the execution of the insane in its jurisprudence, Louisiana prior to 1966 would also have adopted the common law standard of competency if it was needed as a means to implement the rule. Historically speaking, Louisiana was authorized to recognize a Ford-like standard some 20 years before Ford was written.

D. Louisiana has embraced the Ford standard implicitly by the dictum of Lowenfield v. Butler, State v. Perry and State v. Allen.

As was previously argued, Louisiana has implicitly recognized the Ford standard in Lowenfield v. Butler and Perry, supra. The Fifth Circuit in Lowenfield quoted the Ford test extensively, and Perry, in dicta, referred to the standard as "lacking the capacity to understand the death penalty." Perry, 502 So.2d at 564. The Allen case, supra, also framed the question as whether the relator was "incapable of understanding the proceedings against him." Allen, 15 So.2d at 871.

Independent of this jurisprudence, the State has also pointed out that Louisiana was also required by the Code prior to 1966 to borrow from the common law when necessary. Therefore, an argument can be made that Louisiana would have used a common law standard to implement its jurisprudence, which, since the 19th century, had embraced the common law prohibition against executing the insane. In other words, the promise of Allen could have been delivered with the common law standard as described by LaFave & Scott.

III. THE FORD STANDARD IS DESIGNED TO FURTHER THE PRIMARY PURPOSES OF THE DEATH PENALTY, WHICH MOST COMMENTATORS AGREE ARE RETRIBUTION AND DETERRENCE. AT THE SAME TIME, THE STANDARD RECOGNIZES THE DEATH ROW INMATE'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND UNDER LA. CONST. ART. 1, §20.

"Virtually all of the commentators who have examined the issue have agreed that the test for insanity should be tailored to the purposes of the rule. For example, if the reason for the rule against executing the insane is to ensure that the condemned prisoner has every opportunity to explain why he should not be executed, then the test of insanity should be whether the prisoner has the faculties to think of such a reason and the ability to communicate it to a lawyer. If, however, the purpose of the rule is to let the condemned make his peace with God, then recognition of the moral reprehensiveness of the crime that was committed should be the decisive factor. Alternatively, if the rationale for the rule is that 'he who must suffer,' then the prisoner must be able to appreciate his impending fate." Pastroff, 77 J. of Crim. Law & Criminology, at 864.

Up to this point, the State has concentrated on why the standard of competency to be executed in Louisiana is the Ford standard. Now the State would like to examine the underlying purposes of the Ford standard. As Justice Powell himself stated, the standard was designed to address insanity in the context in which it arises, that is, subsequent to conviction. In a sense, the standard is a screening mechanism to see that the inmate's constitutional rights are protected, and yet at the same time, to ensure that the purposes of the death penalty are served.

A. The Ford standard supports the Eighth Amendment by staying the execution of an insane inmate.

Commentator Schultz, 20 Creighton L.R. 867, 874, stated that the death penalty serves two principal social purposes: retribution and deterrence. She wrote:

"In deciding whether the execution of the insane is constitutional, courts must consider to what extent these purposes of the death penalty are defeated, if at all, by the fact of the prisoner's post-conviction insanity." 20 Creighton L.R. at 875.

In his concurring opinion, Justice Powell disregarded many of the early day reasons said to underlie the common law rule of not executing the insane. For example, while Blackstone would have required a defendant to possess the capability of making arguments in his behalf, Justice Powell stated in response:

"These guarantees (modern day appeals and collateral review of convictions and sentences) are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." Ford, 105 S.Ct. at 2608.

However, Justice Powell seems to adopt the early day common law belief that execution of the insane was cruel. He stated:

"It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally." Ford, 105 S.Ct. at 2608.

Justice Powell stated that requiring the death row inmate to know of his impending death and the reason for it protected that inmate's rights under the Eighth Amendment.

"A number of States [Mississippi, Missouri and Utah] have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition." Ford, 105 S.Ct. at 2608.

In Ford, death row inmate Alvin Ford had proffered a psychiatric examination claiming that he believed his death sentence had been invalidated. Justice Powell said that if Ford could prove his assertion that HE was unaware of his impending death, then the Eighth Amendment would require a stay of execution. Therefore, the standard would ensure that the inmate's Eighth Amendment right was not violated because he would be given time to prepare for his death, and he would know the reason his life was being extinguished.

B. Applying the Ford standard of competency to the case at bar did not violate the petitioner's rights under the Fourteenth Amendment. By using the Ford standard, Louisiana has fulfilled its promises under Allen and ex rel Paine not to execute the insane.

The petitioner's counsel has argued to this Honorable Court that the trial court erred by applying the Ford standard because Louisiana had vested a greater liberty interest in the petitioner than required by the United States Constitution.

The State will explore this issue in greater detail in Argument VI, D, infra. For now, it suffices to say that the petitioner's argument lacks merit for two reasons.

First, the majority of Ford (Justices Marshall, Brennan, Steven, Blackmun and Powell) agreed that source of this right not to be executed while insane stemmed from the Eighth Amendment. Hence, according to the majority view, this petitioner's reliance on the Fourteenth Amendment is misplaced.

Second, the laws of this State never vested such a right in the petitioner. In contrast to the Ford majority that the Eighth Amendment prohibited the execution of the insane, Justices O'Connor, White and Rehnquist disagreed, and stated that neither the Eighth nor Fourteenth Amendments gave the inmate such a right.

However, Justice O'Connor, with whom Justice White concurred, stated that Florida law had instead created a right under the Fourteenth Amendment not to be executed while insane. She said:

"With Justice Rehnquist, I agree that the Due Process Clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency. The relevant provision of the Florida code, however, provides that the Governor 'SHALL' have the prisoner committed to a 'Department of Corrections mental health treatment facility' if the prisoner 'does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him.' Our cases leave no doubt that where a statute indicates with 'LANGUAGE OF AN UNMISTAKABLE MANDATORY CHARACTER' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." Ford, 106 S.Ct. at 2611-12. (Citations omitted; emphasis supplied).

In Ford, a Florida statute had governed the determination of a death row inmate's competency to be executed. The Florida law was "language of an unmistakable mandatory character," Hewitt v. Helms, 459 U.S. at 471-72 (1983), and thereby had vested a protected liberty-interest in the death row inmate. In contrast to the Florida statute, there is no positive law in Louisiana governing post-conviction competency proceedings to settle claims of incompetency to be executed. Without "language of an unmistakable mandatory character" in a Louisiana statute, the petitioner's claim that his Fourteenth Amendment due process rights have been violated in without merit.

In Louisiana, the jurisprudence has embraced the common law rule prohibiting the execution of insane inmates. The trial court, by applying the Ford standard in absence of positive law, has fulfilled the State's promise under Allen and in re Paine not to execute the insane. Because the petitioner understands the death penalty and reason for it, he is competent to be executed. Because he meets the legal test recognized in Louisiana, his execution does not violate either the Eighth or Fourteenth Amendments.

C. The Ford standard satisfies the requirement of La. Const. art. 1, §20 requirement that the punishment not be "excessive."

The petitioner's counsel has argued to this Honorable Court that by using the Ford standard, the trial court violated the petitioner's right under La. Const. art. 1, §20, which prohibits cruel, excessive or unusual punishment.

First of all, Louisiana's addition of the word "excessive" to its Constitution does not expand a citizen's substantive right as guaranteed by the Eighth Amendment itself, which uses only the words cruel and unusual. The late Justice Tate, in State v. Sepulvado, 367 So.2d 762 (La., 1979) addressed Louisiana's use of the term "excessive" in great detail, and summarized that art. 1, §20 provided each convicted person a chance for judicial review on the facts of his sentence to determine whether or not the punishment, although within the statutory limits, was "excessive" as applied to THIS DEFENDANT.

In Sepulvado, the Court had held that under art. 1, §20, the imposition of a 3 1/2 year term of imprisonment at

hard labor for an 18-year-old, first-time offender for carnal knowledge of a juvenile was "excessive" and thereby unconstitutional. Evidence showed that the defendant had a job, a family and was unlikely to become a repeat offender.

Justice Tate stated:

"The deliberate inclusion of a prohibition against 'excessive' as well as 'cruel and unusual punishment' adds an additional constitutional dimension to judicial imposition and review of sentences. By it, the excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of this court. See La. Const. art. 5, §5(C)." Sepulvado, 367 So.2d at 764 (Emphasis supplied).

In comparison, Justice Tate explained:

"The Eighth Amendment to the federal constitution prohibits 'cruel and unusual' punishments. It was long ago held that excessiveness was a factor to be considered in determining whether a punishment was within the constitutional prohibition of that clause...However, later cases gradually subsumed the excessiveness element within the other, more liberal tests for determining whether the "cruel and unusual" standard was violated, giving rise to a general rule against appellate review for excessiveness per se." Sepulvado, 367 So.2d at 764-65. (Citations omitted).

In other words, under the old Louisiana Constitution of 1921, the Supreme Court declined to review sentences for excessiveness. Under the new Constitution of 1974 art. 1, §20, the Court ~~was~~ mandated to do so.

Since the Sepulvado opinion in 1979, the U.S. Supreme Court had adopted a similar approach in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). There the U.S. Supreme Court held that a punishment under the Eighth Amendment must be in proportion to the severity of the crime, and that no penalty was per se constitutional. The Court had found that a sentence of life imprisonment without parole imposed upon a defendant who was convicted of a bad check charge was disproportionate despite the defendant's past criminal activity.

In this case at bar, the petitioner's death sentence has already been reviewed for excessiveness, as required by this Honorable Court under La. C.Cr.P. art. 905.9. In Perry, supra, this Court decided that a death penalty based on two aggravating circumstances imposed upon this petitioner was not excessive.

IV. THE TRIAL COURT PROPERLY FOCUSED ON THE PETITIONER'S PRESENT CAPACITY BY CONCLUDING HE IS COMPETENT TO BE EXECUTED; BOTH THE PETITIONER'S OWN ACTIONS AND EXPERT TESTIMONY SHOW THAT HE IS COMPETENT TO BE EXECUTED; PETITIONER'S ACTIONS AND THE TESTIMONY CLEARLY REVEAL THAT HE UNDERSTANDS THE DEATH PENALTY AND THE REASON FOR IT.

At this point, the State suggests that the facts of this case conclusively prove that the petitioner is competent to be executed. This Honorable Court in State v. Perry, supra, required that the trial judge himself make the decision of competency for execution.

"We stress that the determination of defendant's sanity is for the trial judge, not a sanity commission alone." Perry, 502 So.2d at 564.

The trial judge in this matter heard the expert witnesses testify at three separate hearings, as well as questioned them. He read and received all medical reports. Absent an abuse of discretion, the trial court's ruling that the petitioner Michael Owen Perry is competent to be executed should stand.

A. The trial court correctly focused on the petitioner's PRESENT mental capacity to proceed to execution independent of his mental illness or future medical needs.

In determining the petitioner's PRESENT mental capacity, the trial court properly focused on the petitioner's PRESENT condition between the period of January 20, 1988 and October 21, 1988. This approach is consistent with the State's jurisprudence.

In State v. Hampton, 218 So.2d 311 (La. 1969), the Louisiana Supreme Court ruled that a defendant whose mental capacity was maintained through the use of prescription drugs was competent to stand trial. The defendant in this case was diagnosed as suffering from chronic paranoid schizophrenia. Even though there was testimony to indicate that the defendant's competency might relapse if she was taken off the psychotropic medication, the court stated that the medication was of "no legal consequence." The trial court in the case at bar quoted from Hampton for this proposition:

"...that this condition has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the CONDITION ONLY. It does not look beyond existing competency and erase improvement produced by medical science..." (R., p. 0775) (Quoting from Hampton, supra, at 312, emphasis supplied).

In other words, the fact that the petitioner's mental state improves with medication, or that medication contributes to the petitioner's competency, is not legally relevant. The focus of the proceeding is on the petitioner's PRESENT CAPACITY. Therefore, the trial court's ruling concerning medication to ensure the petitioner's competency at some future date was separate and apart from its ruling that the petitioner ~~was~~ PRESENTLY competent to be executed. (R., p. 0005)

B. Petitioner understands that he faces the death penalty because he murdered five members of his family, and he knows he will die if electrocuted.

The State contends that the petitioner, Michael Owen Perry, by his own words and actions, clearly establishes that he understands the death penalty and that he knows why his life will end in the state's electric chair.

The testimony concerning Perry's own words and actions is especially critical to this Honorable Court for two reasons: First, it proves conclusively that the petitioner understands the death penalty and reason for it. Therefore, he is competent for execution.

Second, the testimony concerning Perry's own words and actions shows a scheme between the petitioner and his counsel to induce a calculated insanity. In other words, by voluntarily refusing medication, the petitioner may become insane, and thereby, win a stay of execution. Even though the scheme condemns the petitioner to a life of insanity, petitioner's counsel will also achieve its primary goal: Oppose the death penalty at all costs.

Hence, the evidence shows conclusively that the petitioner is keenly aware of his impending fate: he foresees his death in the electric chair. Dr. Kovac's testimony, infra, also reveals that the petitioner and his counsel are manipulating the criminal justice system. The petitioner may not know of Ford v. Wainwright, supra, but he does know that crazy men are not executed.

(i) Dr. Jimenez' testimony:

Dr. Jimenez' testimony also supports the trial court's finding that the petitioner is aware of his impending death and the reason for it. Dr. Jimenez, who first met the petitioner in 1983 while he was a patient at the Feliciana Forensic Facility, testified that the petitioner is capable of understanding the death penalty. Dr. Jimenez testified at both the April 20 and the October 21, 1988 hearings.

[By the Court:]

Q: *** Now in your letter addressed to me dated March 10th of '88 you say he does understand that he is convicted and also expressed that he does not want to die. So my question is is he aware of the punishment that he has been ordered to suffer and does he understand why he had been ordered to suffer that punishment?

A. Yes sir, he said, uh, when I first went to talk to him he said he was scared to die, he killed his mother because he was angry. And he asked me to help him be able to live.

Q. So...

A. So he does understand that he's convicted of the death of his family and he does understand that the penalty is death.

Q. And does he understand that he is going to suffer that penalty because of his actions?

A. I think if he knows that he's being -- he's dying because he killed his parents, I think he could understand that that's the result -- that his death is the result of the actions that he did.

Q. Okay, thank you."

(R., p. 0525-26; emphasis supplied).

[By Mr. Salomon:]

Q. Now, as the judge explained to you a moment ago, Dr. Jimenez, that your report mentioned the Bennett criteria but the Bennett criteria is not exactly the criteria upon which we are basing today's determination.

A. That's true.

Q. All right. Now what is important to today's determination are some of the following questions, and please answer them to the best of your ability. Is it not true that Mr. Perry expressed to you he did not wish to die?

A. That's true.

Q. Is it not true that he understood his sentence, the death penalty?

A. Yes, sir.

Q. Now when we say he understood his sentence, the death penalty, how were you able to conclude that he understood it? What component of it did he understand? What was it you explained or did he ask questions of you?

A. The first thing Mr. Perry said to me when I went to see him was, uh, I asked him if he remembered me and he said he did. And I said, do you know why I am here. And he said to me, you are here to help me stay alive, is what he said to me. And I said, why did you say that. And so we started talking about what his present condition and about what he had done that ended up in his incarceration and the penalty that he had. So that's when he first told me that he did not kill the family, that somebody else killed them, in fact, that man that killed them also had taken a shot at him in the head. Then at the later part of the interview that's when he said at the end that he was very angry with his mother and called her all kinds of names. And he said that the little boy was also a bastard and that his sister was insane. He started being derogative towards the family and stated that he did kill them. So he does understand that he killed them and that he is scared to die. So I say yes to those last questions that you asked. My apprehension with him is he does get ambivalent and he knows -- he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness.

(R., pp. 0530-31; emphasis supplied).

Dr. Jimenez' testimony also shows that the petitioner knows he is being electrocuted because he murdered his parents, his nephew and two cousins.

[By Mr. Salomon:]

Q. And can you see my distinction? Is it possible that Michael's ambivalence, as you term it, is more in line with a refusal to cooperate, a refusal to assist, rather than, as you put it, he is unable to assist?

A. There is a certain degree of refusal and there's also a certain degree of inability. It's very difficult, and that's the reason why I suggested that I would feel more comfortable if this man were better medicated and better, uh, in a better frame of mind than he is now. Although he does understand that he killed his family and he does understand that he is getting the chair for that crime.

Q. Okay. And you have made those determinations pursuant to your interview that he understands why he's being penalized why he incurs and he going to suffer the penalty of death?

A. Yes, sir, based on my evaluation that's the conclusion I arrived at.

(R., pp. 0533-34; emphasis supplied).

Of the four expert witnesses, Dr. Jimenez' testimony is worthy of the most weight. She was a member of the review team prior to the petitioner's trial, and therefore, she can best address the petitioner's pre-trial competency as compared against his post-conviction competency. Three experts (Drs. Jimenez, Cox and Vincent) agree that the petitioner suffers from a mental illness called Schizoaffective Disorder. Drs. Jimenez and Vincent testified the petitioner's diagnosis is unchanged.

[By Mr. Salomon:]

Q. Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A. No, sir.

Q. The symptoms appear to be the same? They're consistent from your first consultation or observations through to your most recent?

A. Well, I had seen Mr. Perry in a better frame of mind.

Q. By frame of mind you mean what? More cooperative? Less hostile?

A. Yes. And he was able to participate more in interviews. I haven't seen him for two years until I saw him again.

Q. And when you first encountered him after two years did you not testify a moment ago that he recognized you?

A. Yes.

Q. He remembered you? He knew what significance you had in his life?

A. Yes, sir.

(R., pp. 0534-35.)

In September 1988, Dr. Jimenez returned to Angola at the trial court's request to re-examine Mr. Perry. She testified:

[By the Court:]

A. I went to the State Penitentiary to the death row and I saw him there, where he's currently being a resident, or an inmate. I talked to him regarding his -- the reason why he's incarcerated, and what possible -- what, what is the conviction that he had. And he was able to indicate to me that he was there because he was convicted of first degree murder of five people and that he was going to be executed because of this.

Q. Now, were you aware of the fact that he had had an injection of, ah, what I'll call, ah, the long-term, long-affecting Haldol on September 3rd?

A. Yes, sir, I did. He received Haldol Decanoate 2 CC IM September the 3rd, 1988. He had been sporadically taking his medication. Apparently, after that, the Haldol by mouth, but three days before I saw him he had completely refused to take his medication by mouth.

Q. Now, my notes indicate that he was given oral short-term Haldol on September 11th, which would have been two days before your September 13th examination, do your notes reflect that?

A. What I have, sir, is that Haldol ten Milligrams, refusing very often, took once in three days; that would be pretty close, what you have.

Q. And at the time that you saw him on September 13th, was he psychotic?

A. No, sir. He was pretty stable, based on my examination and evaluation.

Q. All right. Let's move on to September 26th, did your examination take place in the same area of the prison?

A. Yes, sir. The same place, and I asked him the same questions, and he told me that I've asked those questions several other times in the past. And, again, I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him, and he was able to do so.

Q. Was he psychotic on September 26th, in your opinion?

A. No, sir, he was not.

Q. And at that time, his last medication injection would still have been September 3rd, is that correct?

A. That's right, sir.

Q. And at that time, on September 26th, did he understand that he was facing the death penalty?

A. Yes, sir. He said: Five counts of murder. I already told you that. That penalty, electric chair for first degree murder.

Q. Did you have a discussion with him about whether or not he was going to take his medication or not?

A. Yes, Sir. He said that he was told by h's lawyer not to take his medicine, the judge wants me to take the medicine so I could be executed. My lawyers, ah, you have you said you have, ah, my lawyers said you have a famous case here, it might go to the U.S. Supreme Court, is what he said.

(R., pp. 0753-54; emphasis supplied).

This latest testimony by Dr. Jimenez, given October 21, 1988, indicates that the petitioner knows exactly why he's on death row. The testimony reveals that the petitioner is keenly aware of the legal process, shown by his reference to the United States Supreme Court. Dr. Jimenez' testimony also corroborates Dr. Kovac's earlier testimony on September 30, 1988, infra, that the petitioner is working in conjunction with his attorneys to refuse medication, and thereby, induce insanity and postpone execution.

Another telling piece of evidence concerning the petitioner's competency to be executed is revealed by Dr. Jimenez' testimony concerning her conversation with the petitioner about his watching the Geraldo talk show. The petitioner not only could recall the events that had occurred, but he related his personal life experiences to those of mass murderer, Charles Manson.

[By Mr. Salomon:]

Q. And could you describe for us his orientation on both of those days of interviews?

A. Yes, sir. He was aware of where he was at. He was aware that it was the month of September. And he didn't exactly know the date, but he was aware that it's September and 1988. He talked about things that he had seen. I asked him what -- how he usually spent his time, and sometimes, he said, just lying in bed sometimes, or sometimes he watched the t.v. show, and he talk about having seen a program about Charles Manson, and he was -- he voiced some concerns about the picture and his opinions about that show.

Q. Okay. Did he indicate, I mean, what show it was he was watching and why it concerned him?

A. It was about a show by Geraldo, and it was on Charles Manson, and he was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed and why, why he, who only killed five people should be executed.

(R., p. 0758; emphasis supplied).

Not only can the petitioner relate to Charles Manson, he is also keenly aware of his impending death.

[By Mr. Salomon:]

Q. Do you recall on -- did he express to you any wishes or information on how he felt concerning his penalty of death that he faces?

A. He told me that when first he was told that he was going to die, he said, well, I'm going to die. I'm going to die, but he told me that as the time come closer, he starts feeling scared. In fact, he said: I'm scared, scared to die. And he, during my last visit had -- I expressed to him how I feel about having to go there so often to evaluate him, I said: It's not really a pleasure coming here talking to you all the time and asking you these things. And he said: Don't feel bad about it, you're just doing your job, and he said that he does not think about dying because it drives him crazy to think about, about that.

(R., pp. 0759-60; emphasis supplied).

In arguments to the trial court, Mr. Rene Salomon, on behalf of the State, explained the importance of petitioner's reference to the Charles Manson program.

[By Mr. Salomon:]

All right. Your Honor, if I might, there are a couple of points that I want to reiterate, recapitulate, not so much, but more iterate for you, is that according to what Dr. Jimenez just said on this witness stand this morning, I think it's important to recognize that a couple of statements Mr. Perry made emphasize the satisfaction of the Ford versus Wainwright criteria which is at issue here today. First, take the statement that Mr. Perry says I saw the Manson program, I saw what Geraldo had to say to him and why do I have to die when he's committed more, been involved in more murders than I. I feel that that is significant and quite pertinent and relevant, for it demonstrates his recall of the events that happened some eight/nine/ten months ago. It indicates an ability to comprehend and understand what he viewed on the television set, and it indicates his ability to not only comprehend and digest that information, but to talk about it in his own terms on a personal level in relation to himself a matter of months later. And I would also submit that the way Charles Manson acted on that program could have influenced the behavior of Mr. Perry at subsequent dates and times, as when he was being video-taped on April the 20th of 1988. The fact that in his recent interviews with Dr. Jimenez, he expressed a fear of dying, and that it has increased, so-to-speak, as time marches forward toward his ultimate fate. That tells me that he has some recognition of the circumstances surrounding himself and the events that are out of his control at the present.

(R., pp. 0764-65; emphasis supplied).

In conclusion, the testimony recited above conclusively proves that the petitioner, in his own words and by his own actions, has shown that he is competent to be executed. Applying the Ford standard, Michael Owen Perry knows he faces death in the electric chair. He also knows why: because he murdered five members of his family. Hence, under Ford he is competent to be executed.

The evidence also shows the petitioner's capacity exceeds the Ford minimum. Michael Owen Perry is keen enough to realize the U.S. Supreme Court is the ultimate arbitrator in the land. He knows he will die if electrocuted, and he is afraid of that death. Subsequently, he has worked together with his counsel to refuse medication. Dr. Kovac's testimony, infra, and Dr. Jimenez' testimony supra, reveal a scheme by the petitioner and his counsel to manipulate the criminal justice system. These are planned and calculated decisions; just as the murders were planned and calculated.

C. Expert testimony of three experts reveal that the inmate understands that he will die in the electric chair for the five murders he committed. The inmate clearly knows of his impending death and the reason for it.

Expert testimony supports the trial court ruling that the inmate, even without medication, knows of his impending death and the reason for it.

As stated, supra, Dr. Jimenez' testimony clearly establishes that the petitioner is competent to be executed. Michael Owen Perry told the doctor he was scheduled to be executed because he had murdered five people. (R., pp. 0753-54, 0758) Dr. Jimenez gave similar testimony at the April 20, 1988 hearing, supra.

(ii.) Dr. Cox's testimony:

Dr. Cox's testimony coincides with Dr. Jimenez' findings that the petitioner understands he is to be electrocuted for murdering five members of his family, and yet it goes even further. Dr. Cox testified at the September 30, 1988 hearing that even at the petitioner's worst moments, the petitioner still satisfies the Ford criteria.

[By The Court:]

Q. As best you can recall, would you explain or tell us exactly what you did and how Mr. Perry appeared and how the conversation went?

A. I pretty much had the standard conversation I had with Mr. Perry when I see him. I asked him how he was doing, uh, again went into his circumstances with him, asked him to talk to me about his situation.

Q. What do you mean by circumstances and situation?

A. His awareness -- well, number one, how he's doing, day to day how he's feeling, what's going on with him, etcetera. I specifically asked him -- I was told the weekend before I saw him, he had been upset and I had to go to the hospital for an emergency injection of medication. I questioned him about that. I then talked with him about his understanding of his position on death row, why he was there and the implications of his situation. Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me he had been having hallucinations, voices, as he described it, over the weekend which had bothered him and that caused him to create outbursts that led to him going to the hospital. I noticed several times during the interview when discussing his situation, his possible execution, the crimes for which he was convicted, he burst into periods of laughter which would interrupt our conversation. And I'd wait for him to compose himself and then he would start talking again. His thought processes were disorganized. He indicated to me that he was still hallucinating. My conclusion was that he was getting worse, even on medication. And I suggested to the staff that the dosage of medication would have to be increased. It was my impression, however, that he was aware of the fact that he was under a sentence of death, and that the process of electrocution could kill him and that he was aware of why he was on death row. As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the Bennett criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation.

(R., pp. 0737-38; emphasis supplied).

On cross-examination by Mr. Salomon in the State's behalf, Dr. Cox reiterated his position.

"I directly asked him if electrocution would kill him and he said yes, he knew it would. I asked him if he understood that he was under a sentence of death, if that was his understanding and he said yes.

(R., p. 0745).

In his first court appearance on April 20, 1988, Dr. Cox testified that the petitioner was competent to be executed.

On redirect questioning by the petitioner's attorney, Mr. Nordyke, Dr. Cox stated his opinion.

[BY Mr. Nordyke:]

Q. Have you formulated an opinion as to whether or not Mr. Perry is competent to be executed?

A. Well, as you and I have discussed before, that's a relative thing. It has to do with the treatment Mr. Perry is receiving. I have seen him at times when I did not feel he was competent to be executed. I have seen him also at times when I thought he was competent to be executed.

Q. Is there any way of predicting when he is competent?

A. When I saw him the last time which was on the 3rd of March he was on neuroleptic medication. He was about as -- he was functioning about as well then as I've ever seen him function. At that time I went through the whole matter with him and he was aware of why he -- of where he was, what his sentence was, what he would be executed for and was aware of the fact that he could be executed. He was taking Haldol at that time.

(R., pp. 0550-51; emphasis supplied).

Dr. Cox reiterated the same position under questioning from the trial court.

[By The Court:]

Q. Because I'm not certain at this point what tests the appellate courts might ultimately set forth to guide this Court, the test for legal sanity on the issue of guilt or innocence at a trial, is the ability to distinguish right from wrong...

A. Yes, sir.

Q. ...based on your examination of him on March 3rd, 1988 when he was on Haldol, at that point in time, in your opinion, was he sane or insane?

A. At that point in time, in my opinion, he was able to distinguish right from wrong.

Q. Also, on that date in question when he was on Haldol did he have the capacity to know of the fact of his impending execution?

A. Yes, sir, I went into that with him that day specifically as I do most of the time when I see him. He was aware of where he was, he was aware that he was under a sentence of death. He was aware that he could be killed by the electrocution, and he was aware of why he was there.

Q. That was my next question. Did he understand the reason for the death penalty...

A. Yes, sir.

Q. ...being imposed?

A. He did, though at the time he denied his guilt to me for the crime. And he knew why he was there.

(R., p. 0568; emphasis supplied).

A common thread throughout all of Dr. Cox's testimony is the relationship between the inmate's competency and whether or not he's medicated. By ordering his client removed from medication, Mr. Nordyke has attempted to stifle the sanity hearing process. Dr. Cox stated in his April 20, 1988 report the likely result of such a strategy:

"It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed." (Doctor's report of April 20, 1988; emphasis supplied)

On the other hand, while the petitioner is maintained on a routine medication schedule, Dr. Cox concluded:

"He (the defendant) has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence." (Ibid.; Emphasis supplied).

Evidence gathered from Dr. Cox' testimony clearly establishes that the petitioner is PRESENTLY competent to be executed, and if he becomes incompetent at some point in the future, it is because the petitioner's attorney has been allowed to meddle with the petitioner's medication.

(iii.) Dr. Vincent's testimony:

Dr. Vincent's testimony supports a finding that the petitioner meets the criteria of Ford.

In questioning by the trial court, Dr. Vincent testified:

[By The Court:]

Q. The issue today, Dr. Vincent, of course, is this competency to be executed. And I know you're familiar with other competency rulings where you've testified in other courts. Based on the court cases that have been submitted to you the issue of competency to be executed, the inquiry is two-fold. Number one, whether or not he is aware or unaware of the punishment he is about to suffer. In March when you interviewed him did you have occasion to discuss with him the death sentence, the electric chair?

A. Yes, I did.

Q. What is -- or what was his understanding of that at that time?

A. That's one thing that I was trying to determine at that point. I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and he indicated at that point that he would be executed. So there was some understanding that if he's found competent to proceed that he would be executed.

Q. And he knows what that means? He knows what execution is? He knows what the death penalty is? He knows what the electric chair is?

A. Yes, he expressed some fear of dying in relationship to that.

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

(R., pp. 0622-23; emphasis supplied).

On the surface, Dr. Vincent's testimony to the trial court appears to somewhat contradict his earlier conclusion while under direct examination by the petitioner's attorney, Mr. Nordyke. While Dr. Vincent stated, in his opinion, the petitioner was not competent to be executed, his testimony that followed indicated that the petitioner knew he would be executed if the court determined he was competent during the hearings. The State respectfully submits that Dr. Vincent simply drew the wrong conclusion from the facts he observed. The facts Dr. Vincent reported clearly support the conclusion that Perry knows of his impending death and reason for it.

[By Mr. Nordyke:]

Q. And what was that opinion?

A. My opinion as of March 5th of this year was that he was not competent to be executed at that point.

Q. Would you please detail for the court what your evaluation consisted of and your findings that support that opinion?

A. The evaluation consisted of approximately ninety minutes of interview. I interviewed Mr. Perry alone in a small room for approximately ninety minutes. After he left I spent a few minutes talking with a particular security guard there who indicated that he had known Mr. Perry since he arrived in Angola. My observation of Mr. Perry at that time when I first said hello to him he thought I was -- he asked if I was you. And then he asked if I was some other attorney who had represented him previously. And I identified myself as a clinical psychologist who was evaluating him to determine his ability to proceed with the legal proceedings. I -- at some point after that we talked about his knowledge as far as whether he understood what would happen if he were indeed found to be competent to proceed. He did indicate that he knew that he would be executed if he were found competent to proceed. I, uh, he was a little dishevelled at the time that I saw him. His beard was very stragly (sic), very short haircut. He also had some black smudges on his face and I asked about those. He indicated that was from burning some plastic from an audio cassette. And I didn't quite understand what that was all about but I left it at that. He was in leg chains and I think that's the traditional way that people are interviewed on death row. He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight (sic) off the subject, and talked about something completely irrelevant.

(R., pp. 0589-91; emphasis supplied.)

(iv.) Dr. Estes' testimony:

The testimony of the fourth expert, Dr. Estes, as to the petitioner's competency for execution is inconclusive. The State respectfully submits that Dr. Estes has misinterpreted the inmate's condition in light of the legal standard to be applied.

-- On direct examination by petitioner's attorney, Mr. Nordyke, Dr. Estes stated:

[By Mr. Nordyke:]

Q. What is your opinion as regards to his ability to understand the nature of execution and his ability to understand the finality of execution?

A. Well, he failed to show normal abilities in recalling and organizing facts and understanding reasons in various areas which my opinion would be includes the legal areas of concern, his execution, his conviction, his legal rights, ability to cooperate with various authorities at different times. I would presume that those difficulties would arise in various areas. It's my opinion that he was not completely aware of the nature of the proceedings against him even though he was able to acknowledge that he was on death row when I saw him, and at that time he was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did wrong.

(R., pp. 0637-38; emphasis supplied)

On cross examination by Mr. Salomon on behalf of the State, Dr. Estes admitted his conclusion was not based upon any specific test results. Dr. Estes' testimony resulted from a one-time, one-hour meeting with the petitioner. (R., p. 649, April 20, 1988)

[By Mr. Salomon:]

Q. Okay, but I mean I don't want you to repeat -- I mean we'll spend all day going over the eight or nine pages you got here. I mean what's the methods you employed in order to interview Mr. Perry? I mean you sat in here and we had somebody use the House, Tree, Person Test. Did you use that or something similar to it?

A. No.

Q. Did you use the MMPT? Did you use the TAT or something else that psychiatrists use as opposed to psychologists?

A. I did not use any specific psychological tests.

Q. Why not?

A. I wasn't sure that they would be the best way to elicit the information that I needed to have.

Q. Okay. So and your traditional you call just an interview? That's what you applied in this situation?

A. Yes.
(R., p. 0650).

(v.) Dr Kovac's testimony:

Dr. Kovac also testified before the trial court on September 30, 1988, she talked with the petitioner on the death row cell block. His conversation with Dr. Kovac was honest, open and frank. It reveals a man who is competent for execution.

Dr. Kovac testified as to a short conversation she had with the petitioner.

[By The Court:]

Q. What -- when you went and spoke with him that ten or fifteen minutes on the 26th, this past Monday, what did you talk about and what did he say?

A. Well, I initially just went back and introduced myself again to him since it had been a long time since I had seen him, and we talked just in general. I asked him how he was feeling and I told him I was -- my main reason for coming over was my concern that he was not taking his oral medication. I asked him, you know, how he had been doing in general and he said okay, sleeping a lot. Uh, he did say that occasionally he heard some voices. And I said, well, perhaps if you started taking your medication again that that would help and he said no. And then he went on to say that his attorney had instructed him not to take the medicine. And I said, well, you know, I understand but I think just for your best health we really need to talk about this because I think it's in your best health to take your medicine. And, uh, Mr. Perry said, no, my attorney has told me not to take my medicine. He said, it's just -- it's very simple to understand, take my pills and die, don't take my pills and live. And he said, so, I'm not going to take my pills. So I just -- I said, well, you know, you've got an injection that's going to be coming up, and he said, no, I'm not going to take my injections any more either. And I asked him about that and he said that they made his hip burn. And I told him, well, perhaps we could, you know, talk with one of the psychiatrists and maybe that was not the -- we could give him a different medication. And he said, no, my attorney said this is going to go to the supreme court. And he said, I'm just not going to take any -- I don't want any injections, I don't want any other medications. And...

(R., pp. 0717-18; emphasis supplied).

Dr. Kovac also reported that the petitioner's mental state at the time appeared appropriate.

[By The Court:]

Q. Just tell me what you observed...

A. Okay.

Q. ...and what Mr. Perry said and his demeanor as you saw it.

A. In response to the questions that were asked of Mr. Perry, again his affect seemed to be appropriate. He appeared to be coherent. His

association -- he did not appear to me to be delusional, although he did state that he occasionally still was hearing voices. He stated that he was sleeping a lot, that he, you know, was eating his meals. (R., p. 0721).

In conclusion, the trial court, in this matter, weighed and balanced hundreds of pages of transcripts and other evidence to reach its conclusion that the petitioner was competent to be executed. Three of the four experts on the sanity commission found criteria that supports the petitioner is competent under the Ford standard. The trial court's decision must stand, absent an abuse of discretion. The State is convinced the record clearly shows that the petitioner is aware of his impending death and the reason for it.

There is no jurisprudence in this state concerning the amount of deference owed to a trial court's ruling that a death row inmate is competent for execution. However, this Honorable Court, in Perry, supra, indicated that the decision was one to be made by the trial judge, not the sanity commission. Also, in a pre-trial setting to determine competency to stand trial, this Honorable Court stated in State v. Bennett, 345 So.2d 1129 (La. 1977):

"At the inquiry into defendant's competency, these vital factual considerations were supplanted by the physicians' conclusion of law that defendant was able to assist counsel. ONLY THE COURT, NOT THE DOCTOR, IS QUALIFIED TO MAKE THIS DECISION." Bennett, 345 So.2d at 1138. (Emphasis supplied).

In another case two years later concerning competency to proceed to trial, this Court in State v. Lawrence, 368 So.2d 699 (La. 1979) made a similar statement:

"Although a trial judge's determination of capacity to stand trial is entitled to great weight, the trial judge may not rely so greatly on the medical testimony that he abandons the ultimate decision on competency to the medical experts." (Citation omitted.) Lawrence, 368 So.2d at 701.

In the case at bar, the trial court made the decision in accordance with this jurisprudence. Therefore, on appeal, it must be affirmed.

V. INMATE'S/ COUNSEL HAS ARGUED TO THIS HONORABLE COURT THAT HIS CLIENT IS INCOMPETENT UNDER ANY STANDARD BECAUSE HE IS MENTALLY ILL. THIS ARGUMENT DEFIES THE JURISPRUDENCE OF THIS STATE WHICH HOLDS THAT MENTAL ILLNESS ALONE IS NOT SUFFICIENT IN AND OF ITSELF TO ESTABLISH MENTAL INCAPACITY TO BE EXECUTED. INMATE HAS ALSO FAILED TO CARRY HIS BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE.

Three of the experts (Drs. Jimenez, Cox and Vincent) reached the same conclusion as to the petitioner's diagnosis: Schizoaffective Disorder. Dr. Cox stated the mental illness was something like diabetes; it cannot be cured, but it can be controlled with medication. (R., p. 0553) Dr. Estes stated he came to "a tentative conclusion" that the petitioner was also suffering from Schizoaffective Disorder. (R., p. 0639). That diagnosis was made in 1983 prior to the petitioner's trial, and Drs. Jimenez and Vincent, both of whom have had contact with the petitioner during both pre-trial and post-conviction proceedings, testified that diagnosis remained unchanged in 1988. (For Dr. Vincent, see R. p. 0593, 0619, 0632-33; for Dr. Jimenez, see R. p. 0511).

Opposing counsel repeatedly used the term "floridly psychotic" in its brief to this Honorable Court. The State would like to point out how the experts view those terms. Dr. Cox stated that "psychosis" is "a symptom like fever is a symptom. And Schizoaffective Disorder is an illness, it makes people become psychotic on occasion." (R., p. 0563) Dr. Vincent defined "floridly" as "blatantly or overtly or obviously psychotic." (R., p. 0596) In other words, when the opposing counsel refer to their client as "floridly psychotic," it only means that the petitioner is suffering from an apparent symptom of his mental illness. "Floridly psychotic" is not an end, in and of itself; it is a symptom, like a fever is a symptom of the flu.

A. The inmate suffers from the same mental illness today as he did prior to his trial and conviction. Mental illness did not prevent the petitioner's trial, conviction and sentence to death; it will not prevent his execution.

Petitioner's counsel argues the petitioner is mentally ill, and therefore cannot be executed. His mental illness has

been consistently diagnosed as Schizoaffective Disorder. Petitioner's first signs of mental illness date back to at least 1981, two years before the murders. Similar symptoms of the illness have been observed both during pre-conviction and post-conviction proceedings. Mental illness was not a bar to the petitioner's trial, conviction and death sentence; it is not a bar to this execution.

In State v. Chinn, 87 So.2d 315 (La. 1955) the court stated that mental illness or mental retardation alone was insufficient to prevent a defendant from proceeding to trial. In Chinn, the defendant was a convicted murderer with the intelligence of an 8- or 9-year-old. The court said:

"We are mindful of the fact that it is possible for a person to have such a feeble mentality as to be unable to distinguish between right and wrong, to understand the proceedings against him, or to assist in his defense. However, according to the universally accepted jurisprudence, mere weakness of mentality or sub-normal intelligence does not, of itself, constitute legal insanity." Chinn, 87 So.2d at 320. (Citations omitted.)

Expert witnesses in this case have testified that the petitioner is suffering from the same mental illness today as he did prior to his trial. This Honorable Court in Perry, supra, addressed this petitioner's mental capacity to proceed to trial in great detail and decided:

"We have discussed extensively Perry's mental capacity to proceed despite his withdrawal of the plea of 'not guilty and not guilty by reason of insanity.' We have determined the defendant was capable of proceeding at trial." Perry, 502 So.2d at 564.

In Perry this Court affirmed the petitioner's conviction and death sentence. Despite his mental illness, the petitioner was found by a sanity commission to be competent to stand trial; he understood the nature of the proceedings and was capable of assisting in his defense. Now a sanity commission has found that the petitioner understands the death penalty and reason for it, and therefore, is competent to be executed. Mental illness alone did not bar his conviction for five counts of first-degree murder. Mental illness shall not be a bar to execution.

If the petitioner's argument that mental illness alone was sufficient to bar execution, then there would be no need for a standard of competency to be executed. The test would

simply be whether or not mental illness exists. This is contrary to the basic legal precepts embraced by this State, this nation and even the common law.

Opposing counsel in their brief focused heavily on the petitioner's diagnosis, symptoms, bizarre behavior and statements, and mental health treatment as the reason why the petitioner was not competent for execution. However, taking all this bizarre behavior as a given, the expert testimony clearly showed, supra, that the petitioner still knew of his impending death and the reason for it. Although lengthy, the following excerpt of a Fifth Circuit case will give this Honorable Court a point for comparison.

In Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), reh. den. 714 F.2d 137, cert. den., 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453, the condemned murderer had raised the issue of his sanity post-conviction as a reason to stay his execution. Gray had been convicted and sentenced to death for the murder of a 3-year-old girl.

The United States Court of Appeals, Fifth Circuit, for the Southern District of Mississippi, denied the death row inmate habeas corpus relief on the grounds of present insanity. This case was written prior to the Ford decision in 1986, and the standard applied by the 5th Circuit was more expansive than the one adopted in Ford.

The Mississippi Supreme Court denied Gray a writ of coram nobis. The Fifth Circuit concluded:

"The claim for relief on present insanity was supported by strong affidavits...to the effect that he was a chronically psychotic young man; however, the mental condition or 'insanity' shown was also shown to have been of a nature long pre-existing Gray's trial and conviction. Under this record showing, therefore, the petitioner was not denied any substantive or procedural due process accorded him by Mississippi law." Gray, 710 F.2d at 1053.

In Gray, attorneys for both sides agreed to apply a standard enunciated by Justice Frankfurter in his dissent in Sollesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed 604 (1950) and reprinted at 21 Am.Jur.2d "Criminal Law" at 123. It reads as follows:

"The proper test of capacity at the time of punishment is whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what

he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court." 21 Am.Jur.2d "Criminal Law" at 257-58.

Against this standard, the Fifth Circuit thereby cited in detail the findings on Gray's mental capacity based on expert evaluation. A Dr. Lewis examined Gray for six hours and summarized her findings as follows:

"In conclusion, Jimmy Lee Gray is a chronically psychotic young man whose psychosis is manifested by delusions, auditory hallucinations, and bizarre beliefs. He is also extremely intelligent and attempts to hide this symptomatology. In addition, there is evidence of some central nervous system damage manifested by lapses of attention, dizziness and nausea periodically, inability to concentrate at certain times, multiple recurrent episodes of *deja vu*, and episodes of unprovoked intense fear and anxiety as well as episodes of extreme visual and perceptual clarity. He is also frequently loose, rambling, and illogical in his thought processes. His psychotic state coupled with his organic impairment undoubtedly contributed to his initial crime and to the second episode, for which he is currently incarcerated. Of note, his symptomatology, if properly worked up medically and psychologically, is amenable to treatment and he should be able to live and function safely in a prison environment." *Gray*, 710 F.2d at 1055.

The doctor continued:

"Mr. Gray is extremely paranoid. It is also clear that his profound mental and emotional disturbances frighten him, that his understanding of and even conscious awareness of his pathology is very limited, and that he would very much like to be considered sane and a sinner rather than to be thought to have such experiences. For these reasons, it is extremely difficult to elicit a history of symptomatology from him, and brief examinations such as Mr. Gray has had in the past, are ill-suited to uncovering the actual nature of his illness. In fact, I believe that even the symptomatology described in my report, based on a much longer examination, is most likely an underestimate of his psychiatric illness.

"In addition, because of the nature of his illness and his own incomprehension and fear of it, he is not competent to assist counsel or mental health experts in demonstrating a defense of his rights in light of his illness, for his ability to identify the relevant facts to confirm his defense is so gravely impaired. Nor is he able, to this day to understand or even to perceive or meaningfully describe the nature of the psychotic feelings which underlay the crimes for which he has been convicted, and for one

of which he now faces execution. In effect, he does not understand the crime for which he was tried.

"Mr. Gray's psychotic state, coupled with this organic impairment, undoubtedly contributed to his initial crime and to the second episode for which he is now awaiting execution. The facts concerning his mental state, indeed, demonstrate beyond question that the crime for which he faces execution (as well as the earlier offense) was committed while he was under the influence of extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *Ibid.*

Although *Gray* predates *Ford* by three years, the Fifth Circuit assumed that the Constitution would protect an incompetent from execution. The court stated its position as follows:

"We expressly do not hold (or deny) that the federal constitution's fifth and eighth amendments may implicate protection of the execution of the mentally incompetent or, at the least, may mandate procedural right by way of an evidentiary hearing to resolve this issue.

"Nevertheless, assuming for the present purposes the existence of such right, and further assuming that the test advanced by the parties is the proper one, we are ultimately unable to hold, in the present state of the law, that the showing made by *Gray*, if proved at a contested evidentiary hearing, would bring him within the scope of the putative constitutional protection against execution. The showing undoubtedly indicates that *Gray* has serious psychotic impairments that sometimes distort his appreciation of reality, and the mental illness shown might impair his ability to secure adequate diagnosis of his mental deficiencies. Nevertheless, as we view it, these mental deficiencies -- if fully proved -- would nevertheless not be of a nature to deprive him of 'sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment' or to deprive him of 'sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful.'" *Golesbee v. Balkcom*, supra, 339 U.S. at 20 n.3, 70 S.Ct. at 462 n.3.

"Gray thus has not made a showing sufficient to justify an evidentiary hearing on the issue of whether the federal constitution bars his execution on the ground of his present mental condition." *Gray*, 710 F.2d at 1056.

While lengthy, this excerpt proves that the petitioner Michael Owen Perry is competent under *Ford* to be executed. While the mental capacity of Gray and this petitioner have some points in common, the mental condition of Gray was far more

extreme. And yet, under a standard more stringent than Ford, Gray was held to be competent for execution.

Like Gray, Michael Owen Perry has a history of mental illness predating the crime by at least two years. Like Gray, Perry is intelligent, and has delusions, hallucinations and bizarre beliefs. The psychiatrist examining Gray reported "loose, rambling and illogical thought processes;" similar reports have been made about Perry. Like Gray, Perry as shown in medical reports and Dr. Kovac's testimony, supra, considers himself sane. However, the similarities end here. Gray was much worse for the simple fact he had organic brain damage. All experts agree the petitioner suffers from no organic mental impairment. (R. P. 0600). In other words, under a standard higher than Ford, a death row inmate with a mental condition far worse than the petitioner's was declared competent for execution. And even though Gray's mental state was far more severe than the petitioner's, the expert testified it could be controlled by medication. Perry's mental condition pales in comparison to Gray's. If Gray was competent for execution, Perry most certainly is.

B. The petitioner's counsel argues his client is "ambivalent" and hence is incompetent to be executed. Inmate's earlier ambivalence -- at times confessing to the murders, at times denying them -- did not prevent a 12-member jury of his peers from unanimously imposing a sentence of death. Hence, ambivalence is not a bar to execution.

Petitioner argues he is "ambivalent" and therefore, cannot be executed. Dr. Jimenez, supra, says petitioner meets Ford even though she finds "ambivalence."

Opposing counsel has twisted Dr. Jimenez' testimony as to her finding that the petitioner was "ambivalent." (See Pet.'s Brief, p. 51). While the doctor did state that she had found the petitioner "ambivalent," she did not explain in what context he was "ambivalent." Dr. Jimenez clearly said: "HE's aware that HE is on death row because HE's going to die. HE's aware that HE killed his family, and HE will tell you HE did." (See R. p. 0531, emphasis supplied.) Without a clear explanation of what the doctor meant by the term "ambivalence," it has no value to the question of the petitioner's present capacity to be executed. When asked how ambivalence might be eliminated or controlled, Dr. Jimenez suggested that medication should be increased.

[By Mr. Salomon:]

Q. How are we to stabilize him when there are no medications that eliminate ambivalence?

A. Well, that's the problem.

Q. You have medication that you would suggest issuing, offering and having him ingest to eliminate such ambivalence?

A. I don't really know that I would be able to eliminate it because it because -- but you could probably try him on a bigger medication and give it to him consistently and see then if there would be a change or there would be some improvement. He had improved before.

(R., p. 0532; emphasis supplied).

In addition, ambivalence, which means the simultaneous existence of conflicting emotions, is irrelevant. Admission of guilt is unnecessary. Many a condemned murderer has gone to his death claiming his innocence. Petitioner was ambivalent prior to his conviction -- at times he confessed to the murders, at times he denied them -- and yet it did not bar his conviction.

Prior to trial, the petitioner was also ambivalent when examined by Dr. Vincent as to the murders. Ambivalence is not a factor in the standard for determining competency for execution; therefore it does not stay execution.

C. The counsel for the inmate has misinterpreted the doctors' analogy to a "moving target." Experts testify that the inmate does respond to medication.

Petitioner argues he is a "moving target" even while medicated, and therefore cannot be executed. (See Pet.'s Brief, p. 50, 83). The petitioner's counsel has taken Dr. Cox's statements in reference to "moving target" and stretched them to mean the petitioner's mental capacity can never be stabilized. This is entirely incorrect. In fact, Dr. Cox concludes the opposite. The expert clearly says repeatedly that the petitioner responds to medication, and that if he is found to be deteriorating even while on medication, the solution is to either ensure that the inmate takes his medication or increase the dosage of the IM medication.

The term, "moving target" first appeared at the April 20, 1988 hearing in this context:

[By Mr. Nordyke:]

Q. Doctor, out in the hall you indicated that Michael was, quote, at best a "moving target." Would you explain to the Court what you meant by that?

A. I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change. It's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

Q. So I guess in summary what I've heard you saying is that you've seen him not competent...

A. Yes, sir.

Q. ...Sometimes and you've seen him competent...

A. Yes, sir.

(R., pp. 0553-4; emphasis supplied)

Dr. Cox clearly stated at the April 20, 1988 hearing that the petitioner responds to medication. He said his diagnosis, in part, was based on this result: "Because he gets better when he takes medication and he gets worse when he doesn't." (R., p. 0557).

The second time Dr. Cox was questioned about the term "moving target" was at the September 30, 1988 hearing.

[By Mr. Giarrusso:]

Q. And the prior testimony that you gave at the April, 1988 hearing concerning Mr. Perry being a, quote, moving target, close quote...

A. Yes, sir.

Q. ...is still viable in your opinion today?

A. Yes, I do, I believe that.

(R., p. 0740; emphasis supplied)

Dr. Cox's use of the term "moving target" only describes how the petitioner reacts when he is taken on and off medication, as was done at the behest of his attorney. The petitioner needs a monthly intramuscular injection of Haldol-D

plus a daily supplemental oral dosage in order to be stabilized. Dr. Cox testified that on this regime, stabilization will not result until three months later. (R., p. 0743). In other words, if the petitioner is indeed a "moving target," Mr. Nordyke is responsible. Now Mr. Nordyke wants to benefit by this maneuver. On cross-examination, Mr. Salomon questioned Dr. Cox on the importance of routine medication:

[By Mr. Salomon:]

Q. And speaking of the oral medication, Dr. Cox, I understand from his medical information available at the hospital that he was to have a standing order of sorts for IM medication with Haldol?

A. The long-acting Haldol he was to receive two cc's every month on around the 10th of the month, the 10th or 11th, or something, every month, once a month. That medicine is given once a month.

Q. And do you know what precipitated that standing order or upon whose order that was?

A. I think it was ordered by Dr. Abase who is not a consulting -- Abade, rather, a consulting psychiatrist at Angola, who evaluated Mr. Perry and ordered this medication.

Q. Now this two milligrams or two cc's...

A. Two cc's, yes, sir.

Q. Two cc's of Haldol which is what we call the long-lasting medication, what is long lasting? What's the period?

A. This medicine can be given every month and given that way it will produce a circulating blood level, a therapeutic blood level that will last a month if the proper dosage is given. This drug people can take it monthly and get effective treatment from it if the dosage is proper.

Q. Okay. And you mentioned blood level, and I'd like to follow up by asking once you get a long-lasting injection of Haldol-D how long does it take for you to reach a plateau of sorts where you may, to use my terminology in layman words, stabilized?

A. Three months with that drug.

Q. And why is it, Dr. Cox, that we have in Mr. Perry's case oral medications which are assigned to supplement, apparently, this intramuscular injection he receives?

A. I don't believe he's been on an intramuscular (sic) for three months. And even if he has it's obvious he's not on enough medication, so he needs the supplement to control his symptoms.

Q. Okay. Why do you give a supplement on a daily through orals as well as the monthly injection?

- A. Well, that's standard procedure with this medication that when you begin a person on Haldol long-acting for the first three months it's accepted procedure to use a supplement of oral medication until the patient does reach a plateau after three months at which point they can be maintained on the long-acting only. It's in the prescribing information with the medicine.
- Q. That would be the Physician's Desk Reference?
- A. Um-hum.
- Q. Now what would happen if, assuming that you take your IM injections for the three month period that you don't supplement it with the orals on a daily basis?
- A. The person would say (sic) ill longer, be harder to control their symptoms, they would remain psychotic longer.
- Q. Now is there a way to stabilize a patient through injections only where you have a patient that's unable to ingest medication through the oral means?
- A. It's difficult. It would mean probably having to give the patient the medication not only in long-acting injectable form but short-acting injectable form, also.
- Q. That would be short-acting when they manifest the symptoms?
- A. Yes, or daily, you know, we have written protocols to treat people with IM medication if they refuse it by mouth, two or three injections a day.
- (R., pp. 0742-4; emphasis supplied).

Mr. Nordyke also questioned Dr. Vincent about the term "moving target."

[By Mr. Nordyke:]

- Q. And that was -- were you in the courtroom when Dr. Cox testified?
- A. Yes, I was.
- Q. Would you agree with his analysis -- I think he said it was an offhand remark, a moving target?
- A. Mr. Perry is a very a very interesting individual, this case is a very interesting case. It's also very difficult. Given his history, given his intelligence, given his tendency to be somewhat slippery in that we're not always sure exactly what's going on with him, yes, a moving target would be an apt description.
- Q. I guess what I'm finding interesting is you saw him, I think, two days after Dr. Cox did and he was floridly psychotic when you saw him and still on medication at that occasion at that point in

time. Is that consistent with the illness of Schizoaffective Disorder?

- A. I'm assuming he was taking medication at that point.
- Q. Okay.
- A. The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. But if indeed he was taking it it's quite possible to be floridly psychotic at one point and yet more rational at other points. And that's not very unusual.
- (R., pp. 0593-4; emphasis supplied).

Judging from Dr. Vincent's testimony, it appears he interpreted the term "moving target" as more or less a description of the petitioner, rather than a reflection of whether the petitioner was medicated or not. Dr. Vincent said he found working with the petitioner was challenging because he was intelligent and "somewhat slippery."

In conclusion, whether or not this Honorable Court agrees that the petitioner is a "moving target," it should not preclude his execution. Medication enhances the petitioner's mental capacity, but even without medication, the petitioner is still competent for execution under the Ford test. Dr. Cox testified that even at petitioner's worst moments, he is capable of understanding he will be executed for murdering five members of his family.

[By The Court:]

- Q. Have you ever seen him psychotic when he was on his medication?
- A. Yes, sir, I've seen him have psychotic symptoms when he was on medication, yes, sir.
- Q. When he's on medication and when he is in these psychotic -- in this psychotic condition was he able then to be competent...
- A. If you're ...
- Q. ...relative to the sentence in this case?
- A. I've seen him at times when he was having I thought psychotic symptoms but he was aware of the fact that he had a sentence of death and that he could be executed and he could be killed by the execution process, yes, sir.

(R., pp. 0556-7; emphasis supplied).

The State also reminds this Honorable court that the petitioner's own chart shows that he was not medicated during his trial, and yet a sanity commission found that he was competent to stand trial and a jury rejected his mitigating evidence of insanity at the penalty phase, all affirmed on direct appellate review. (See Pet.'s Brief, p. 37).

D. Petitioner's counsel argues his client is incompetent to be executed because HE doesn't know HE is sentenced to die. Petitioner's own actions and expert testimony, however, prove the petitioner is very much aware of his impending fate.

This assertion that the petitioner does not know HE is scheduled to die for the murders of his family is simply not supported by the testimony. Dr. Cox stated the petitioner knew HE was to be electrocuted (R., pp. 0556-7).

Dr. Kovac's testimony implies the petitioner is very much aware of HIS fate. She testified: "He said, 'it's just -- it's very simple to understand, take my pills and die, don't take my pills and live.'" And he said, 'so I'm not going to take my pills.'" (R., p. 0717; emphasis supplied).

Dr. Vincent stated: "HE did indicate that HE knew that HE would be executed if HE were found competent to proceed." (R., p. 0590; emphasis supplied).

On questioning by the trial court, Dr. Vincent, despite a conclusion that the petitioner was not competent to proceed to execution, contradicted that finding when viewed in light of Ford by testifying:

"I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and HE indicated at that point that HE would be executed. So there was some understanding that if HE's found competent to proceed that HE would be executed." (R., p. 0623; emphasis supplied).

The doctor also testified that the petitioner is afraid to die. (R., p. 0623; emphasis supplied). Dr. Vincent's only concern on this issue was that while the petitioner understood that a person convicted of first-degree murder can be sentenced to death, the doctor felt the petitioner fluctuated on whether or not he committed the murders.

Dr. Jimenez also testified that the petitioner knew he faced the electric chair because of his conduct. (R., p. 0530-1; R. p. 0753).

Although Dr. Estes' testimony is fuzzy on this issue, he did testify:

"It's my opinion that he was not completely aware of the nature of the proceedings against him even though HE was able to acknowledge that HE was on death row when I saw him, and at the time HE was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did wrong." (R., pp. 0637-8; emphasis supplied).

The evidence overwhelmingly proves that the petitioner knows HE is to be executed. As Dr. Jimenez' testimony points out: "...He was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed, and why, why HE, who ONLY killed five people, should be executed." (R., p. 0758; emphasis supplied.) Does a man who is unsure of his own fate ask such a question? Obviously not.

E. The inmate's evidence is duplicitous, unreliable, biased, misleading or self-serving, and thus, is insufficient to prove by a preponderance that the petitioner has become insane subsequent to conviction.

The petitioner's attorneys have included numerous charts and tables in their brief to this Honorable Court. The State contends this material is neither scientific nor objective.

Because of time restraints the State was unable to verify all charts and tables. However, the State reviewed the Alabama statute cited as their first reference. (See Pet.'s Brief, p. 71). The statute called for a temporary transfer of a death row inmate to a state hospital only for the duration of a mental examination. The statute in question also allowed a death row inmate one chance without judicial review to question his sanity post-conviction, and thereby, supported the state's interest in finality.

Petitioner's charts and records also indicate he was hospitalized "through most of January 1986." However, the petitioner was hospitalized for only six days in January 1986.

Petitioner's chart also misleads this Honorable Court into believing that the petitioner was hospitalized for 45 percent of the year during 1986. (See Pet.'s Brief, p. 36). The medical records clearly show that the petitioner was hospitalized between December 20, 1985 and January 6, 1986, for a total of 17 days -- hardly 45 percent of the year of 1986.

Another inaccuracy is that the discharge summary on the petitioner for January 6, 1986 and the emergency room report for December 20, 1985 show that the only diagnosis of the petitioner was done by a nurse. The doctor who examined the petitioner did not record his diagnosis; the space on the medical record for this information has been left blank. However, the opposing counsel's brief (See Pet.'s Brief, p. 43) incorrectly states that the doctor made a diagnosis on the petitioner.

Finally, the petitioner's counsel has arbitrarily cut off all medical records at January, 1988, which at this point in the proceeding, is more than a year ago. The State finds this extremely odd since the issue before this Honorable Court is the petitioner's PRESENT mental capacity to proceed to execution.

As to the petitioner's other evidence, such as medical records from Central State Hospital and the Feliciana Forensic Facility, this has already been reviewed and decided upon in past sanity hearings. If these records did not prove the petitioner's insanity before, there is no reason why they would prove it now. This evidence is merely duplicitous. Using this same evidence, a sanity commission found that the petitioner was competent to stand trial. Hence, if the evidence is unchanged, so must be the result. The petitioner is competent to be executed.

Finally, the State contends that the petitioner's videotaped courtroom performance carries little weight because it was "show time." The petitioner was well aware that a video camera was focused exclusively on him. He also knows that if he acts crazy, he cannot be executed. This fact alone must cast doubt as to the validity of his courtroom behavior.

First of all, the petitioner has a history of malingering and malingering symptoms of the medicine's side-effects. Dr. Jimenez said petitioner is smart enough to act crazy.

[By Mr. Salomon:]

Q. And, Dr. Jimenez, am I paraphrasing you correctly, I believe, earlier when you said -- or testified in this same courtroom on this same witness stand that Mr. Perry is basically smart enough to act crazy?

A. Yes, sir.

(R., p. 0535; emphasis supplied).

As stated earlier, the petitioner has also equated his position with that of mass murderer Charles Manson, and as Mr. Salomon pointed out in his argument to the trial court, *supra*, many of the expressions used by the petitioner in his courtroom appearance are identical to those used by Manson. There is no doubt Mr. Perry is intelligent. He's smart enough to enhance his courtroom appearance with crazy statements. Dr. Vincent also recognized petitioner is intelligent and "somewhat slippery." (R., pp. 0593-94). The State would like to stress, that at this point, the petitioner has nothing to lose and everything to gain if he convinced a court he is crazy.

Dr. Jimenez also has testified that at times the petitioner exaggerated the symptoms of his illness.

[By Mr. Salomon:]

Q. Doctor, in regards to the Haldol with which Mr. Perry was medicated prior to his trial, and as I understand it, since he's been on death row, he has exhibited symptoms that were side effects?

A. Yes, sir.

Q. Okay. And some of those were what?

A. Some of those exist but at times he would exaggerate them.

Q. All right. The symptoms would include drooling?

A. Yes.

Q. Impaired gait or walking?

A. Yes.

(R., p. 0527; emphasis supplied).

While Dr. Jimenez reported that the petitioner had malingered in the past, Dr. Cox said he would not be surprised if a death row inmate would malingere, but that he had not personally seen the petitioner malingere.

[By Mr. Salomon:]

- Q. Now can you offer to the court any analysis or opinion, being an expert in forensic psychiatry, on why Mr. Perry would have malingered while medicated with Maldol, as we discussed the one aspect of psychotic illness within Schizoaffective Disorder?
- A. Well, I think it's obvious he could have malingered psychotic symptoms at some point to escape prosecution for the crime for which he was charged. That's a very distinct possibility. He might have malingered psychotic symptoms to get moved from one part of the hospital to another, that happens sometimes.
- Q. And have you ever found any objective criteria or facts on which to base a similar opinion?
- A. With respect to him?
- Q. Yes.
- A. Now I'm not sure I understand the question.
- Q. Well, just as Dr. Jimenez found that he malingered while on medication, have you determined him to mangle while on medication?
- A. No, sir, I don't think I have. I can't honestly say that I have ever seen him mangle while he's on medication.
- Q. Have you ever utilized any specific tests in order to confront the question of malingered while medicated?
- A. I don't know of any specific tests that exist. When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's a change in his function. To me, there's been a very clear relationship between him being compliant with medicine in the clinical picture that I see when I examine him.
- Q. Have you ever detected him to be malingered whether on or off medication?
- A. I can't say that I have, no.
- Q. Do you recognize any symptoms of malingered?
- A. No.
- Q. Would not that guy who was in here a moment ago on a different case -- there are some objective criteria for malingered, correct?
- A. Yes.
- Q. And what are those?
- A. Well, he could give an inconsistent history, he could give inconsistent symptoms, uh, his behavior would change. And this is one of the valuable things about having people in a place

like forensic, its shall we say easy to mangle symptoms. You come in to see me for thirty to forty-five minutes and just sit there for that limited period of time and act crazy. It's much more difficult to do it around the clock twenty-four hours a day consistently over a period of days or weeks. So this is the sort of pattern you'd begin to notice in people, that they look crazy when they come in to see the doctor but the staff says the minute they leave the room they do find they always win the poker games in the ward, uh, etcetera, etcetera, are very aware of what's going on, understands the rules of the institution, all this sort of thing. But when they see you they suddenly select if they go crazy. They also claim say symptoms which really don't make sense, certain sorts of memory deficits. They claim certain sorts of symptoms that don't fit with the diagnosis they have. These are some of the things you notice.

(R., pp. 0564-6; emphasis supplied).

Whether the petitioner has malingered symptoms or not, the evidence clearly shows that Michael Owen Perry and his counsel have jointly decided to forego medical treatment in hopes of "trumping" a valid death sentence. This is obvious from Mr. Nordyke's referral to his client as an "exhibit." (R., p. 0661). Petitioner and his counsel have teamed up to induce insanity and create a loophole to execution.

While the petitioner performed his role as a "crazy man" while under his attorney's direct examination, a close look at the cross-examination by Mr. Salomon will prove that the petitioner had direct recall over events that have been important in his life. For instance, the petitioner remembered sitting in the courtroom for his trial, he knew there were 12 members of the jury, he remembered his birthday, his father's name, the trial judge's name, the reason for the trial, the fact the jury had condemned him to death in the electric chair, as well as other facts about his family members. Simply put, when asked a direct question, the petitioner could give a direct answer.

In the petitioner's brief, opposing counsel made several off-hand remarks that need to be addressed. First, petitioner's counsel stated that "the State of Louisiana chose to present NO evidence." (Pet.'s Brief, p. 10). This presupposes the State had a burden of proof. Obviously our opponents have forgotten THEY must prove the petitioner's insanity SUBSEQUENT to conviction by a preponderance of the evidence. The State has no such burden.

Second, opposing counsel appears to indicate that if there is any doubt as to the petitioner's capacity, his execution should be stayed. (Pet.'s Brief, p. 52). In other words, opposing counsel wants to point to one piece of evidence and say: 'See, this is doubt. Therefore, he's incompetent.' Again, this overlooks that the petitioner needs to prove his case by a preponderance. Any doubt won't do.

Attorney's for the petitioner allege they have carried their proof by a preponderance. As this brief clearly shows, obviously they have not. In fact, the State contends that the opposing counsel has not even come close. The petitioner's brief is full of contradictions. For example, at one point, opposing counsel will argue their client is incompetent under "any" standard, which logically must include Ford (See Pet.'s Brief, p. 53-54). Two pages later, the attorneys cite Dr. Cox (See Pet.'s Brief, p. 56), whose testimony clearly shows that even at his worst moments, the petitioner is aware of his death sentence and is aware he will die from electrocution.

Perry's attorneys also accused the trial court of abusing its discretion because its decision was based on "'pick and choose' testimony." (See Pet.'s Brief, p. 57). At the moment this line was written, opposing counsel must have forgotten that the trial court, according to the jurisprudence of this State, must decide the question. In other words, the trial court is mandated by law to consider all the evidence, and then, after determining which evidence is most trustworthy and most reliable, reach a decision. Any other method is an abuse of discretion.

And while opposing counsel accuses the trial court of "pick and choose," they apparently believe their philosophy is better. That is, they "pick and twist" expert testimony to support their arguments. For example, the testimony of Dr. Jimenez concerning the term "ambivalent" and the testimony of Dr. Cox concerning the term "moving target" were taken out of context, and molded as needed to support their claims.

As the State's brief pointed out, supra, Dr. Jimenez found the petitioner clearly met the Ford standard; her use of the term "ambivalent" was never defined in context as to what the petitioner was "ambivalent" about. Dr. Cox also testified that despite describing the petitioner as a "moving target," the petitioner could be stabilized with medication. Drs. Vincent and Cox agreed it is not unusual for this petitioner or

others to fool medical personnel by pretending to take the oral medication when, in fact, they are not. Dr. Jimenez said the only proof-positive means of administering such medication is by injection.

The record clearly shows that if the petitioner's mental state varied, it was all attributed to petitioner's counsel, Mr. Wordyke, who removed his client from medication even though doctors have advised that Maldol is medically necessary for the petitioner's well-being.

The petitioner's brief has other inaccuracies as well. For instance, opposing counsel stated the petitioner was "declared incompetent to stand trial." This is clearly wrong. As this Honorable Court recognized in Perry, supra, rather, the experts concluded that the petitioner needed "further evaluation." (Perry, at 502 So.2nd at 547-8.)

In short, the petitioner's brief is inaccurate, inflammatory and convoluted, and therefore, is deserving of little credence.

VI. INMATE'S COUNSEL ARGUES THAT LA. C.C.R.P. ART. 641 IS THE STANDARD OF COMPETENCY TO BE EXECUTED IN LOUISIANA. THUS, UNLESS THE PETITIONER CAN UNDERSTAND THE PROCEEDINGS AGAINST HIM AND ASSIST IN HIS DEFENSE, HE IS INCOMPETENT TO BE EXECUTED. THIS ARGUMENT, HOWEVER, IS CONTRARY TO THIS STATE'S POSITIVE LAW AND JURISPRUDENCE.

At this point, the State would like to focus on why the standard of competency to be executed in Louisiana is NOT La. C.Cr.P. art. 641, a standard written expressly for competency to proceed to trial. Art. 641 provides:

Mental capacity to proceed exists when, as a result of mental disease or defect, a DEFENDANT presently lacks the capacity of understand the proceedings against him or to assist in his defense." La. C.Cr.P. art. 641 (West 1989), (Emphasis supplied.)

A. The Louisiana State Legislature has never made a conscious choice to use art. 641 as the test of competency to be executed. This Honorable Court has also deferred to the State Legislature in drafting standards of competency.

Clearly the positive law of this State does not support the inmate's contention that art. 641, rather than Ford, is the STANDARD of competency to be executed. The State Legislature, when drafting art. 641 in 1966, never intended that the standard should be applied post-conviction in a proceeding to determine whether a death row inmate is competent for execution. A close and detailed analysis of art. 641, including the jurisprudence surrounding its application, supported further by historical research, is conclusive proof that Louisiana, in fact, has never adopted art. 641 as the STANDARD. Therefore, as the State has argued previously, the STANDARD of competency for execution in Louisiana is the STANDARD applied by the trial court to the case at bar: The inmate understands the death penalty and the reason for it.

First of all, a starting point for the State's argument is that art. 641 predates Ford v. Wainwright by 20 years. Prior to the Ford decision in 1986, a substantive right under the Eighth Amendment not to be executed while insane was never recognized. If this Honorable Court was to agree to the petitioner's contention that when art. 641 was written, it was intended to apply to the petitioner's situation, then the Court is, in effect saying, that by statute, the State Legislature granted a death row inmate a statutory right not to be executed

while insane 20 years before the Ford decision. The State contends that this Honorable Court will reject such an implication. If the petitioner's argument is accepted, every death row inmate who has been seated in the State's electric chair for the past 23 years had a similar statutory right.

As this Honorable Court may remember, Justice Powell stated that the standard he adopted was a baseline standard, and that the States were free to adopt by statute more expansive standards of competency. The Louisiana State Legislature has not yet acted upon this invitation. Therefore, the standard in this State is the one adopted by the trial court in this matter, which was first enunciated by Justice Powell in Ford.

Before examining Louisiana's posture post-Ford, the State would like to examine how two other southern states, Texas and Florida, have reacted to the Ford opinion.

The State contends that Louisiana's position here is comparable to the one faced by a Texas court. In ex Parte Jordan, 758 S.W.2d 250 (Tex.Cr.App. 1988), a Texas court, lacking positive law on the issue, deferred to the State Legislature to address the issue. Until that time, the Texas court had embraced the Ford standard.

In ex parte Jordan, a death row inmate, convicted of capital murder and sentenced to death, appealed on a writ of habeas corpus that he was incompetent to be executed. The issue arose after the death row inmate had been charged with the aggravated assault resulting from an altercation between the inmate and deputies at the Harris County Jail. A psychiatrist had ruled that the death row inmate was incompetent to stand trial on the assault charge. Although this assault charge was subsequently dismissed, the inmate's competency to be executed was now in question. Three independent psychological evaluations concluded that the death row inmate "was presently unable to comprehend the pendency, nature and purpose of his execution, but, with appropriate treatment, could attain competency within the foreseeable future." ex parte Jordan, 758 S.W.2d at 251.

The petitioner, Clarence Curtis Jordan, himself, testified. Following a hearing, the trial court ruled that under Ford, the petitioner was incompetent to be executed. The court ruled that the insane defendant was not entitled to have his execution set aside, but was granted only a stay of

execution until he regained competency; that the trial court procedures utilized to determine the defendant's competency was in compliance with the Eighth Amendment; and that the defendant was not entitled to be transferred to a mental hospital to undergo treatment, but was required to use the penitentiary's in-house facilities.

The Court of Criminal Appeals of Texas, en banc, granted the petitioner Mr. Jordan a stay of execution so it could review the validity of the post-conviction incompetency procedures in view of Ford. The Court stated that this case was the first in Texas to address the issue of execution competency as dictated under Ford. The trial court had referred to:

"...the alarming lack of any Texas statute specifying the procedures to be followed in raising and determining a defendant's execution competency and in the treatment and periodic reassessment of competency following an incompetency finding. At a loss for any other alternative, the court sua sponte created its own procedures requiring a periodic psychiatric examination of applicant to be conducted every ninety (90) days." ex parte Jordan, 758 S.W.2d at 252.

The Appeals Court turned to the Ford decision and noted that while the United States Supreme Court "expressly charged the individual States with the task of developing procedures to ensure that the insane would not be executed," the Supreme Court gave little guidance on how it should be done. The Appeals Court stated:

"Further, as pointed out by Justice Powell in his concurring opinion, the Court failed to articulate a proper legal test of insanity in the execution context. Justice Powell, the sole writer on the subject, concluded that the proper test should be whether the defendant was able to comprehend the nature, pendency and purpose of his execution. Thus, ultimately, and after much debate, two critical issues were left open: the constitutionally acceptable procedures necessary to effectuate Ford and the proper legal test of execution competency." ex parte Jordan, 758 S.W.2d at 252-253.

In reviewing Texas statutory law, the Appeals Court stated that of the 41 states that have a death penalty, at least 30 states had Ford statutes. However, Texas, like Louisiana, had no positive law concerning competency for execution. The Court continued:

"At the present time, Texas has no statute addressing this issue. Ironically, this is a divergence from the past. At common law, Texas forbade execution of the insane and the 1879 through 1965 Codes of Criminal Procedure all contained statutes explicitly barring execution of the insane and setting out the general procedures to be followed once the issue was raised...However, in 1975, the legislature completely rewrote Art. 46.02 and inexplicably omitted the section dealing with execution competency...Legislative history sheds no light on the reason for this omission." ex parte Jordan, 758 S.W.2d at 253. (Citations omitted.)

Because Texas positive law was silent, the Appeals Court approved of the trial court following Ford both in regard to procedures as well as the legal test of insanity. Until the State Legislature said otherwise, the courts of Texas were directed to follow the standard enunciated in Ford. The following excerpts give some insight into the Appeals Court's position:

"Presently, and especially in light of Ford, there is grave need for the reenactment of a more specific and directive version of the old statute. We find five procedural issues presented for IMMEDIATE LEGISLATIVE RESOLVE: (1) how possible incompetency is to be brought to the court's attention; (2) what fact-finding procedures are necessary to determine incompetency for execution; (3) what is the proper legal test of incompetency for execution; (4) upon a finding of incompetency, what treatment is to take place; and (5) how and upon what intervals is the possibility of regained competency to be brought to the court's attention. We leave the task of constructing an appropriate statute to the Legislature and invite them to do so at the earliest opportunity..." (Emphasis supplied.)

"Even in the absence of statutory guidelines, the procedures adopted by the trial court in the instant case comport with the constitutional considerations discussed in Ford...."

"The judge, in his competency determination, utilized the Powell test: whether applicant was capable of comprehending the nature, pendency and purpose of his execution. Applicant does not challenge use of this single Justice standard..." (Citations omitted.)

"We applaud the trial court's scrupulous action in this matter in that great efforts were made to effectuate the intent of Ford even in the absence of statutory law. We will further applaud prompt legislative action in this area."

"The relief prayed for is granted only to the extent that applicant's execution is stayed until the trial court finds him competent for execution. Such competency is to be evaluated in accordance with the procedures previously followed which we have found to be in compliance with Ford." 758 S.W.2d at 253-255.

The State contends that ex parte Jordan is very persuasive as to the matter this Honorable Court now addresses. Like Texas, Louisiana has no positive law expressly designed for application in determining competency prior to execution. Like Texas, Louisiana has followed the common law rule that the insane will not be executed. Like Texas, Louisiana at one time had positive law concerning a death row inmate who had become insane. As will be seen, infra, Act No. 261 (1918) provided procedures to determine the competency of a condemned inmate who had been committed to a hospital following post-conviction insanity. Under the act, the inmate's execution would proceed if it was determined that his competency had been regained.

The immediate solution in Texas was one of judicial restraint. Until the Texas State Legislature acts, the Texas courts will follow the standard enunciated by Justice Powell in Ford. The Texas Appeals Court pointed out that while Justice Powell's legal test of competency has not directly been approved by the Court's majority, the standard is by statute adopted in some states and has been favorably referred to by Justices Brennan and Marshall in Johnson v. Cabana, supra.

In conclusion, the State urges this Honorable Court to follow the approach used in Texas. Until the Louisiana State Legislature addresses the issue, the legal test of competency prior to execution in Louisiana should be the Ford standard.

The state most directly affected by the Ford decision was Florida, which has reacted with positive law in compliance with that decision. In Ford, the United States Supreme Court in June 1986 had found that Florida's criminal procedures had violated a death row inmate's constitutional rights. The Florida Supreme Court, in response, promulgated in November 1986, an emergency rule of criminal procedure regarding competency to be executed. See In re Emergency Amendment to Florida Rules of Criminal Procedure, 497 So.2d 643 (Fla. 1986). The new emergency rules embraced a standard similar to the Ford standard: the death row inmate is competent for execution if he "understands the nature and effect of the death penalty and why it is to be imposed" upon him. Ibid. The new

emergency rules also provided for judicial proceedings to review the Governor's determination that the inmate was competent for execution.

In December 1987, the Florida Supreme Court amended these rules in In re Amendment to Fla. Rules of Cr. Proc., 518 So.2d 256 (Fla. 1987). The standard was stated in Fla. C.Cr.P. 3.8111(b) as follows:

"A person under sentence of death is insane for the purposes of execution if such person lacks the mental capacity to understand the fact of the impending execution and the reason for it." In re Amendment, 518 So.2d at 257.

While the wording of the legal test changed somewhat, it is still basically the same test enunciated by Justice Powell in Ford.

Florida's post-Ford rules were tested in Martin v. Dugger, 686 F.Supp. 1523 (S.D.Fla. 1988). Responding to a condemned murderer's writ of habeas corpus, the District Court held that the state court's competency proceedings violated the inmate's due process rights, and the state court was ordered to conduct an independent hearing to determine the inmate's competency to be executed.

The state court's mistake in this case was procedural; the District Court had found that while the inmate had been granted an evidentiary hearing, his attorney had not been given adequate notice that the defense should be prepared to call witnesses at the hearing. Instead, the defense attorney had learned that the hearing was evidentiary about 15 or 20 minutes before the hearing was to begin. Martin, 686 F.Supp. at 1547. The District Court ruled that this inadequate notice had deprived the inmate of a fair and impartial hearing.

Martin was the first case in Florida to test the state's post-Ford procedures. In this opinion, Chief Justice King examined the Ford opinion at great length. The legal test of insanity followed was basically the same test enunciated by Justice Powell.

In Martin the trial court had ruled that death row inmate Nollie Lee Martin was competent to be executed because he understood the nature and effect of the death penalty and why it was to be imposed on him. Martin had been convicted of murder following the kidnap, rape and murder of a college student.

The Florida Supreme Court in Martin v. State, 515 So.2d 189 (Fla. 1987) had affirmed the trial court's finding of competency to be executed. The District Court referred to this finding:

"The court (Florida Supreme Court) noted that the fact that Martin believes that a satanic conspiracy resulted in his conviction does not override his understanding of why he is being executed. (Martin v. State). The court noted that 'these proceedings were directed only to Martin's competency to be executed, a **NARROWER INTERPRETATION THAN WHAT IS REQUIRED FOR COMPETENCY TO STAND TRIAL.**' (Martin v. State)."
Martin, 686 F.Supp. at 1550 (Emphasis supplied).

District Judge King reviewed Justice Powell's test in light of post-Ford jurisprudence that has adopted the same legal test of insanity, as well as examined the reasons supporting the death penalty, primarily deterrence and retribution.

"If both purposes behind the death penalty are to be served, and therefore, the sentence is to be carried out in accordance with the eighth amendment, the defendant must at least appreciate the connection between his crime and punishment. This appreciation consists of both a subjective and objective part. The subjective part is nothing more than the defendant's perception of the connection between his crime and punishment. A defendant must understand the fact he committed his crime and the fact that he will die at a specific time and place. A defendant must also understand the basic and fundamental logical proposition that because he has committed an act that society and all civilized humanity finds heinous he is to be killed. The objective aspect of this realization test is relatively straightforward. This concept determines whether the defendant's subjective understanding is grounded in reality; that is, is rational."
Martin, 686 F.Supp. at 1570. (Footnotes omitted.)

Justice King explained that the "appreciation" he would require was very similar to Justice Powell's requirement of "perceives the connection."

"The perceive the connection phrasing is not the complete description of the Powell requirement. Powell believed that the eighth amendment forbids the execution of condemned prisoners who are unaware of the punishment they are about to suffer and why they are to suffer it. Justice Powell's use of the term "why" may imply that some sort of explanation is necessary in order to serve the purposes behind the eighth amendment. To serve the policies behind the death penalty, no explanation is necessary. The defendant should only understand that he committed a crime that society finds offensive and because of it,

he is to be punished by death. For eighth amendment purposes, the defendant is not entitled to a detailed explanation of death. Moreover, the defendant is not even entitled to an explanation as to why society (and, obviously, not himself) perceives the offense he committed to be heinous enough to deserve death as punishment. The court believes that Justice Powell's term 'why' can be read to be consistent with these viewpoints, and, hence, the appreciation of the connection between the crime and punishment definition is very similar to Justice Powell's viewpoint." Martin, 686 F.Supp. at 1570-1571.

In a footnote to the above passage, Judge King said a death row inmate is not entitled to a detailed explanation:

"An ordinary person, who never possessed the tenacity to kill another human, may contract a fatal disease. This person will never understand why he is to die. In addition, Nollie Lee Martin never provided his victim with such an explanation. If the innocent person cannot receive this explanation, why should an individual who made a conscious decision to end another human's life?" Martin, 686 F.Supp. at 1571, footnote 21.

Opposing counsel has cited to this Honorable Court the American Bar Association, Criminal Justice Standards: Criminal Justice Mental Health Standards - Competence and Capital Punishment, Standard 7-5.6(b) (August 1987) in support of their position that the petitioner must be able to assist counsel in his defense, or otherwise, he is incompetent to be executed. The State was unable to locate this material. However, Judge King in Martin referred to the ABA standard and said that the legal test he supported was similar to the one the ABA had adopted.

"This meaning of insanity is also consistent with the recent pronouncements of the American Bar Association concerning this topic...The ABA noted that its proposed standards were selected 'to reflect the substantive concern that individuals should not be executed when they lack the capacity for rational understanding of the nature of the proceedings or the penalty that is about to be imposed.' (ABA Standard 7-5.6(b), Comment) To the extent that this rational understanding of the nature of the penalty requires a realistic appreciation, the ABA standard conforms with the appreciation definition." Martin, 686 F.Supp. at 1571.

While the court in Martin disagreed with the trial court's finding that the rational understanding requirement in Dusky v. United States, 363 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), a test for competency to stand trial, was irrelevant when applied in a post-conviction execution competency proceeding, Judge King found the Dusky test of only limited guidance.

"The court must specifically note that the Dusky standard is not fully consistent with the eighth amendment. The Supreme Court formulated the Dusky test to handle a situation where a defendant was not yet tried, much less convicted and sentenced. This defendant required a heightened mental awareness to assure that his constitutional rights were safeguarded. For example, a defendant awaiting trial must be able to assist his counsel in his defense, and must be able to determine whether any of his constitutional rights should be waived. THESE CONCERNS ARE COMPLETELY ABSENT FOR THE PROPERLY CONDEMNED PRISONER. The mental state required here only guarantees that the state utilize the death penalty pursuant to the policies promoting capital punishment. The mental state requirement here is not developed to preserve (sic) other constitutional rights." Martin, 686 F.Supp. at 1572. Footnote 22. (Emphasis supplied.)

In conclusion, Judge King stated:

"A defendant may be mentally ill and still be competent enough to be executed. A condemned prisoner need not have all mental faculties; the prisoner need only appreciate the connection between the crime and punishment...Accordingly, this definition of insanity will govern at the evidentiary hearing. Martin must show that he lacks an appreciation of the connection between his crime and punishment, as discussed above." Martin, 686 F.Supp. at 1572-1573.

While the State has cited the Martin case at length, this Florida opinion strongly supports the State's conclusion that a pre-trial statute like art. 641 is not the proper test of incompetency where incompetency arises post-conviction and the question is the death row inmate's mental capacity for execution. Perry has been tried, convicted and sentenced to death.

The question here is how to define insanity in this context, i.e., prior to execution. Louisiana's criminal law has already defined insanity according to two other contexts in which it arises. La. R.S. 14:14 defines insanity at the time of the criminal act, and codifies the M'Naughten rule that the offender is exempt from criminal responsibility if, because of a mental disease or mental defect, he was "incapable of distinguishing between right and wrong with reference to the conduct in question." This question is decided by the jury.

The second context of insanity is art. 641, i.e., the mental capacity necessary to proceed to trial on the merits. This question is decided by the judge.

In State v. Williams, 346 So.2d 181 (La. 1977), this Court recognized the definition of insanity depends on the context. "The law defines mental incompetence differently for different purposes. Compare, La. C.C. art. 31 (capacity to contract), La. C.Cr.P. art. 641 and La. R.S. 14:14." Williams, 346 So.2d at 186.

In State v. Bennett, 345 So.2d 1129 (La. 1977), this Court recognized the test of insanity is dependent upon the context in which it arose.

"Due process, however, requires a level of EFFECTIVE participation by an accused in criminal proceedings against him. That defendant was found to know the difference between right and wrong would have been relevant in determining his criminal liability, but was totally irrelevant to the issue of his competency to stand trial." Bennett, 345 So.2d at 1137. (Citations omitted, emphasis by Court.)

The State contends, as did the trial court in this matter, that insanity at the time of execution is a third context, one the Code has not addressed and one which needs to be addressed by the State Legislature. (R., p.p. 0769-71). In Ford, Justice Powell expressly said, supra, that one reason for his concurring opinion was to define insanity IN THE CONTEXT of competency to be executed.

The State's position has long ago been recognized. Commentator Grover, 23 So. Calif. L.R. 246 (1950), wrote 39 years ago that the definition of insanity depends upon the context in which it arises:

"First, it is essential to keep in mind the difference between insanity at the time of the alleged crime, insanity during the trial, and insanity after judgment. Sanity at the time of the crime is an element of guilt itself - at common law the issue was raised by a plea of 'not guilty,' and even under the statutory modifications enacted in some jurisdictions the accused is undoubtedly entitled to a jury trial on that question. Sanity during the trial is essential to an effective defense, and our concepts of fair trial and due process require a postponement if the defendant is found mentally deficient. Phyllis, [Phyllis v. Duffy, 338 U.S. 895, 70 S.Ct. 236, 94 L.Ed. 148 (1949)], however, was sane at both these times - his present mental condition, whatever it may be, does not affect his guilt nor does it affect the propriety of the trial in which that guilt was determined. In short, insanity commencing after judgment and operating only to delay execution is all that concerns us here." 23 So. Calif. L.R. at 247.

A close examination of art. 641 et seq. reveals that Chapter 1 through 4 of Title XXI "Insanity Proceedings" clearly shows that these articles were never written with the intent to apply to a post-conviction proceeding to determine competency for execution. While the State recognizes that the preliminary statement and comments are not part of the positive law, they are persuasive as to legislative intent. All articles in the chapter (art. 641 et seq. except for art. 649.1) refer to the "defendant" defined in art. 934 as "a person who has been charged with or accused of an offense." Art. 648A refers to a "criminal prosecution" and "charged with a felony," and art. 648B refers to "if convicted."

The State has not overlooked Allen and Perry, supra, that have suggested that PROCEDURAL pre-trial articles should be applied by analogy to a post-trial proceeding for competency to be executed. This Honorable Court in Perry cited art. 642 as the procedural authority to allow the issue of standard of competency to be raised at any time by the defense, the district attorney, or the court. The Allen procedural threshold of "reasonable ground to believe" insanity has arisen subsequent to conviction has been traced to the predecessor of the present art. 643, a procedural type provision. The State contends the argument here is not over PROCEDURE. The argument is over the STANDARD of insanity. Prior instances of looking to pre-trial procedure do not address the issue of do we find our standard in pre-trial laws.

The procedures codified in the current pre-trial articles are the same procedures long ago recognized at common law. Thereby, the reliance on these pre-trial articles as procedural guides is nothing more than the common law would have required. In State v. Burnham, 111 So. 79 (La. 1926), the Louisiana Supreme Court stated that proceedings for present insanity claims should be made in compliance with the common law procedures.

"The plea is made informally, the issue is raised, and the evidence is introduced. The judge, in his sound discretion, may appoint a lunacy commission, or he may cause to be produced before him all available witnesses in the case, expert as well as nonexpert, in order that proper inquiry may be made into all of the facts and circumstances touching the alleged present insanity of the accused. There is no limitation placed by the Read case upon the method of investigation which the trial judge may adopt. In the absence of special statute on the subject, common law procedure must prevail in this state." Burnham, 111 So. at 82.

In State v. Read, 41 La. Ann. 581, 7 So. 132 (La. 1889), the Supreme Court recognized the common law principle that:

"...It is elementary that a man cannot plead, or be tried, or convicted, or sentenced, while in the state of insanity...Indeed, even after conviction, it may be opposed as a reason why sentence should not be passed...Whenever and however raised, evidence must be received, if offered, and the issue must, in some way, be disposed of. As to the mode of disposition, it seems that much is left to the discretion of the judge." Read, 7 So. at 582-583.

The Burnham and Read cases illustrate that this Honorable Court has discretion in deciding what procedures are applicable to an incompetency hearing. On the other hand, unlike a PROCEDURAL mechanism, this Court has deferred to the State Legislature in drafting STANDARDS of competency.

In State v. Andrews, 369 So.2d 1049 (La. 1979) this Court said:

"This court is not unaware that the McNaughten test has long been under attack, but our legislature has by R.S. 14:14 expressly adopted the McNaughten test of insanity; whether wise or unwise, this legislative choice does not admit of judicial substitution of another test. Any modification or liberalization of our test of insanity in R.S. 14:14 must start with the legislature." Andrews, 369 So.2d at 1054. (Citations omitted; emphasis supplied).

The Bennett opinion, supra, also deferred to the State Legislature in addressing any problems a mentally retarded offender may face in the criminal justice system by stating that "the defendant's proposals for reform are more properly the subject of legislative than judicial action." Bennett, 345 So.2d at 1136.

Most recently, this Honorable Court in State v. Stone, 535 So.2d 362 (La. 1988) deferred to the legislature to address the issue of whether a 15-year-old defendant subject to the death penalty was a "conscious, deliberate decision" by the State Legislature. This Court was reacting to Thompson v. Oklahoma, ___ U.S. ___, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which a plurality of the United States Supreme Court has held it would be unconstitutional to execute a defendant under the age of 16. Under the Louisiana statutory scheme, a 15-year-old defendant could be tried as an adult on a first-degree murder charge, and thereby, exposed to the death penalty. The United States Supreme Court had found that no

state had, by statute, directly provided that a 15-year-old could be executed. Oklahoma law, like Louisiana's, had made such a result theoretically possible, but had not provided expressly for that result.

In Stone, Justice Cole in his concurring opinion said:

"I agree completely with its (Thompson) analysis, concurring only to urge the Legislature of Louisiana to make clear whether or not the law of this state is to forbid the execution of any person for a crime committed before age of sixteen...In light of the rule adopted by the rather weak plurality in Thompson, the State of Louisiana is called upon to decide expressly whether or not it wishes to permit the execution of a person under the age of sixteen years. Only when a state legislature has done so can the issue be put squarely to the United States Supreme court for resolution." Stone, 535 So.12d at 365 (Cole, J., concurring).

Historical research revealed that Louisiana in the late 19th century and early 20th centuries had procedures for handling condemned prisoners who had been committed to a mental hospital because of post-conviction insanity. Under the old law, the death row prisoner's insanity resulted only in a stay of execution; once sanity was regained and a certain procedure was followed, the inmate was again subject to execution. This procedure, therefore, was a means to implement the common law rule not to execute the insane. The State's research failed to uncover a legal test of insanity in the context of granting a stay of execution. However, as argued in Argument II D, supra, where Louisiana's positive law was silent, the old Code required the courts to follow the common law. The State has already pointed out that one standard recognized at common law is basically the same standard as recommended by Justice Powell in Ford.

At the time of Allen, supra, in 1943, the current law of this state was Act No. 261 of 1918. The Allen court cites this provision as statutory authority for not executing the insane. This act would be repealed and superseded in 1944 by Act No. 303.

As will be discussed infra, Allen used the former La. C.Cr.P. art. 267 as its authority to authorize a hearing on a condemned inmate's claim that he has become insane subsequent to conviction. The Allen court made no further mention of Act No. 261. That act provides a commitment procedure for a prisoner who became insane subsequent to conviction. It read in pertinent part:

"That where a person has been committed to a State Hospital for the Insane, who became insane after his conviction for a crime punishable by imprisonment in the penitentiary or BY DEATH, he shall not be restored to liberty, but upon regaining his sanity, he shall be delivered by the Superintendent of said Hospital for the Insane into the custody of the sheriff of the parish wherein he was convicted in order that the judgment and sentence of court may be executed in due course of law..." Act No. 261 (1918) at 483.

This provision, thereby, implies that the insane shall not be executed, but rather, were granted a stay of execution. However, once the condemned inmate regained his sanity, he was once again subject to execution. Act 261 also provided the insane inmate with a lunacy commission that would decide if the inmate's sanity had been restored so that the death penalty could legally be imposed. The commission's decision was subject to judicial review.

"When any person charged with a felony necessarily punishable in the State Penitentiary, or by death, has been adjudged insane, before, or AFTER trial, or CONVICTION, and shall be committed to a State Hospital for the Insane, such person shall not be discharged from said Hospital for the Insane, or delivered into custody of the proper sheriff UNTIL the Superintendent of the East Louisiana Hospital for the Insane of the State of Louisiana, the Superintendent of the Louisiana Hospital for the Insane, and in case of their disagreement, a physician appointed by the Judge of the District Court from whence said criminal insane person was committed, which said gentlemen are hereby constituted as a commission, shall be satisfied after a thorough examination, that such person has been completely restored to sanity and may be discharged without danger to others; and if said commission shall determine that such person has been completely restored to sanity, they shall certify to this fact in writing, which certificate shall be made in duplicate, one to be filed in the office of the Hospital for the Insane, and the other delivered to the proper sheriff, or other official charged with the duty of executing the process of the particular court having jurisdiction in the case. PROVIDING THAT THE FINDING OF SAID COMMISSION BE SUBJECT TO REVIEW BY THE COURT HAVING JURISDICTION OF THE PERSON." Act No. 261 (1918) at 483. (Emphasis supplied.)

Therefore, at the time of Allen, Louisiana law had provided a procedure for determining whether a condemned inmate, who had become insane subsequent to conviction and who had been committed to a State Hospital, had regained his mental capacity, and therefore, would be subjected to execution anew. In Allen the condemned prisoner had not been committed to a State Hospital, but was raising in his own behalf the issue of

incompetency to be executed, claiming insanity subsequent to conviction. The Allen court applied a procedural pre-trial article to entitle the inmate the right to a hearing on the issue provided he raised a "reasonable ground to believe" he had become insane subsequent to conviction. The inmate failed to cross this threshold, and therefore, the court held he was not entitled to a hearing.

The now repealed Act 261 does indicate that the Louisiana Legislature at one time addressed the issue of post-conviction insanity of a death row inmate, at least as far as reinstating a death sentence after sanity had been regained. Like Texas, Louisiana's current positive law has not directly addressed the issue.

One reason for a gap in the State's positive law may hinge on the controversy surrounding the death penalty itself. Art. 641 was drafted in 1966, at a time where the future of the death penalty was in question. Hence, the urgency to address the issue that is now before this Court was not felt. This point is demonstrated by statistics provided by the United States Department of Justice on capital punishment. From 1940 to 1949, Louisiana had 47 executions; from 1950 to 1959, 27 executions. Between the years 1960 and 1969, during the time period when Art. 641 was drafted, there was only one execution. During the next decade that followed, 1970 to 1979, there were no executions. Therefore, for 20 years the chances that the issue of post-conviction competency for execution would arise was virtually non-existent by the simple fact that only one execution in that time period had occurred. However, the 1980s have once again seen the death penalty become a viable means of punishment. In Louisiana, between 1980 and 1987, there have been 15 executions. As the penalty becomes more frequently imposed, the need of a standard of post-conviction competency for execution becomes even greater.

B. Louisiana's jurisprudence has only applied art. 641 in a post-conviction proceeding to determine whether a defendant was competent for trial, not whether he was competent for execution.

The petitioner's counsel has cited two cases, Allen and Perry, in support of its argument that art. 641 is the standard of competency for claims of post-conviction insanity. The State contends that after a close examination of both cases, this Honorable Court will agree with the State's

position that no jurisprudence in this State has EVER held that the standard of competency for post-conviction insanity is art. 641.

To begin with, the opposing counsel has misapplied the Allen holding. In essence, the Allen court used the former La. C.Cr.P. art. 267, a precursor of today's art. 641 et seq., to establish a procedural threshold showing by the condemned murderer. To be entitled to a competency hearing, the inmate must show a "reasonable ground to believe" he had become insane subsequent to conviction. While Act 261 (1918), supra, provided a procedural mechanism to determine whether a committed death row inmate had regained his sanity in order to be competent for execution, there was no procedural mechanism for a death row inmate to initiate a judicial determination that he was incompetent for execution. To bridge an apparent gap in the criminal code, the Allen court applied a pre-trial article to a post-conviction proceeding.

"By its specific terms, this article of the Code, (former art. 267) as amended, relates to proceedings 'before or during the trial' and before conviction, and prescribes the rule to be followed by the trial judge 'to determine the defendant's mental condition.' It says nothing about the proceedings to be followed in a case where a person becomes insane after conviction and sentence. But, for the same reason that a person is entitled to a hearing before conviction on the question of his sanity, he is entitled to a hearing (sic) after conviction; AND THE SAME RULES OF PROCEDURE GOVERN." Allen, 15 So.2d at 871.

By its own words, the Allen court was applying pre-trial articles post-conviction to establish a PROCEDURE. The court never reached the question of whether the STANDARD OF COMPETENCY designed expressly for determining competency to proceed to trial could also be applied by analogy to a post-conviction, competency to proceed to execution proceeding. The matter was simply NOT before the court; therefore, the case cannot be cited for the petitioner's proposition that art. 641 is the standard of competency for execution. The condemned murderer in Allen had failed at the courthouse door. The Allen court HELD that the trial court had not abused its discretion by not appointing a lunacy commission to investigate the relator's claim of post-conviction insanity because the relator had not presented the court "with a reasonable ground to believe" he had become insane subsequent to conviction. Only IF the relator had passed the threshold showing would the court have had to face the next issue of what standard of competency applied.

In addition, as argued in Argument II D, supra, the allegation in the relator's petition to the Allen court was that because of insanity, he was incapable of "understanding the proceedings against him." As pointed out earlier, this language is very close to the test enunciated by Justice Powell in Ford.

The United States Supreme Court itself did not recognize that art. 641 is the standard of post-conviction competency for execution. Justice Marshall, in his plurality opinion to Ford, supra, stated that of the 50 states, 41 states had either a death penalty statute or statutes governing execution procedures. Of those 41 states, 26 states had statutes regulating the suspension of execution of incompetent death row inmates. Noticeably absent on the list is art. 641 for Louisiana's positive law. Instead, Justice Marshall cites the Allen case as embracing the common law rule in Louisiana that the insane will not be executed. Ford, 106 S.Ct. at 2606, footnote 2.

Like Allen, the same Ford-like language is found in Perry, supra. This Honorable Court, in dicta, anticipated the very proceeding that is before you today. In that case, this Court stated that the petitioner would have to prove that because of insanity subsequent to conviction, he "LACKS THE CAPACITY TO UNDERSTAND THE DEATH PENALTY." The Court also required the petitioner to prove by a preponderance of the evidence that he "LACKS THE PRESENT CAPACITY TO UNDERGO EXECUTION." Perry, 502 So.2d at 564. Just previous to these statements, this Court cited the Ford opinion for the proposition that no state imposes the death penalty on the insane. Even though the Court cited art. 642 as a procedural process by which an allegation of post-conviction insanity could be raised by the court or the prosecutor, noticeably absent is ANY REFERENCE to art. 641. This Court in Perry also only cited Allen for two propositions: that the State would not execute an insane death row inmate, and that the inmate must establish a reasonable ground to believe he has become insane subsequent to conviction before he is entitled to a hearing on the issue.

In conclusion, this detailed analysis of Allen and Perry conclusively proves that art. 641 was never applied by this State's jurisprudence to determine post-conviction competency for execution.

The opposing counsel has argued to this Honorable Court that State v. Henson, 351 So.2d 1169 (La. 1977) had applied art. 641 to a post-conviction proceeding, and therefore should apply it to the case at bar. The State has no argument that art. 641 cannot be applied post-conviction. This is obviously provided for in art. 642 which allows the defendant to raise the issue of his mental capacity to proceed "AT ANY TIME." The argument is over what is the standard being applied TO: an ACCUSED'S COMPETENCY TO STAND TRIAL, or A CONDEMNED'S COMPETENCY TO BE EXECUTED? Jurisprudence has supported the post-conviction application of the former; no jurisprudence has supported the latter.

Henson centered on a defendant who had been convicted of burglary. His counsel motioned the trial court for a new trial and arrest of judgment. While awaiting sentencing, the same defendant was pending trial on other criminal charges. Defendant's counsel filed a motion for the appointment of a sanity commission; in behalf of the motion, the defense attorney presented an affidavit from a psychiatrist who had concluded that the defendant "was not presently able to understand the proceedings against him or to assist counsel in his defense..." A district court then ordered the appointment of a sanity commission to determine "defendant's mental capacity to proceed WITH RESPECT TO OTHER CRIMINAL CHARGES PENDING AGAINST HIM." Henson, 351 So.2d at 1172. However, the trial court denied the motion claiming the petitioner had not shown a reasonable ground to believe that his insanity had arisen subsequent to conviction. The Louisiana Supreme Court reversed the trial court, finding that the petitioner had met the requisite threshold requirement, and thereby was entitled to the commission's appointment.

The Court's ruling thereby stayed all criminal proceedings against Henson, including a hearing on the motion for a new trial and arrest of judgment, the court's denial of these motions, and his sentencing on the burglary conviction. However, the issue at all times, whether art. 641 was being applied prior to or after conviction, was the defendant's COMPETENCY TO STAND TRIAL. This case is not applicable to support the petitioner's argument, because art. 641 was not applied post-conviction to determine a condemned man's competency for execution. In other words, Henson was a hindsight examination of what should have occurred prior to trial and sentencing.

The State concedes that Allen, by its reliance on an old pre-trial article, and Perry, by its reliance on art. 642, might be interpreted as applying a few selected pre-trial articles to the case at bar. However, a clear distinction must be made between pre-trial PROCEDURES versus a pre-trial SUBSTANTIVE STANDARD. As argued previously, neither Allen nor Perry EVER applied the substantive standard of art. 641.

Also, Justice Marshall in Ford referred expressly to statutes written for determining a defendant's capacity to proceed to trial, and said in a footnote that the states may find these articles "instructive." Ford, 106 S.Ct. at 2605-2606, footnote 4. He never said those statutes were mandatory or binding. In fact, Justice Marshall, at the time he wrote Ford, and subsequent to Ford in Johnson v. Cabana, supra, has stated his support for the standard as enunciated by Justice Powell.

Most importantly, the United States Supreme Court in Ford did not view art. 641 as the standard in Louisiana to apply to a post-conviction competency hearing for proceeding to execution. As pointed out, supra, Justice Marshall omitted any reference to it in his footnote. Ford, 106 S.Ct. at 2601-2602, footnote 2. Even more persuasive is the omission by Justice Powell of art. 641. Justice Powell opined that requiring a condemned inmate to assist in his defense was an unnecessary element of a competency standard for execution. In a footnote, Justice Powell listed three states that require an inmate to assist in his defense: Mississippi, Utah and Missouri. Louisiana and art. 641 were noticeably absent. Ford, 106 S.Ct. at 2608, footnote 3.

C. The purpose behind art. 641 is to guarantee a defendant his constitutional right to a fair and impartial trial. Because a death row inmate claiming insanity as a bar to execution has already been given a fair and impartial trial, applying art. 641 as the standard post-conviction defeats the state's interest in finality.

Justice Powell's standard in Ford was expressly written to define insanity in the context in which it arises, that is, subsequent to conviction and as a stay to a validly imposed sentence of death. Hence, the standard, as defined by Justice Powell, serves the purposes of the death penalty. This is precisely the strongest argument on why art. 641 IS NOT AND

SHOULD NOT be the standard of competency for execution. The petitioner in this case at bar is perverting art. 641's purpose by attempting to have it applied post-conviction to win a stay of execution.

When a DEFENDANT is awaiting trial on criminal charges, he is an ACCUSED fully cloaked in the presumption of innocence. Art. 641 was specifically designed to protect that defendant's constitutional right to a fair and impartial trial. That entire purpose is dissolved once a valid sentence of death is imposed. The DEFENDANT is now the CONDEMNED. The question in the case at bar is not whether the petitioner had a fair and impartial trial. That question has been answered in the affirmative on appeal to this Honorable Court, with writs denied by the United States Supreme Court. The question here is whether this condemned man is competent for execution. The State emphatically believes that the standard of competency in art. 641 was NEVER intended to answer this question. Furthermore, no jurisprudence has ever applied the standard to this context.

Lastly, the petitioner's guilt and penalty phase is now final. His only affirmative defense to the imposition of a valid death sentence is his insanity. The standard of art. 641 was designed to ensure that a DEFENDANT had a fair shot at winning an adversarial contest against the state. The gamesmanship of an adversarial nature is lost once a conviction is rendered. As Justices Powell and O'Connor point out in their opinions in Ford, due process is flexible; once a defendant crosses the line from being an ACCUSED to becoming a CONDEMNED, his due process rights are diminished accordingly. The State's need of finality and the effective administration of criminal justice override granting a condemned inmate the same due process right post-conviction as he enjoyed pre-trial.

D. The trial court did not violate the petitioner's due process rights by applying the Ford standard instead of art. 641 as the standard of competency to be executed. Louisiana has not vested a state-right entitlement in a death row inmate by adopting art. 641 for a pre-trial proceeding.

As was argued previously in Argument III B, supra, the State did not violate the petitioner's due process rights under the Fourteenth Amendment by NOT applying the art. 641 standard. To be afforded relief under this argument, the

petitioner would have to show that art. 641, like the Florida statute in Ford, specifically vested in the petitioner a liberty interest not to be executed while insane. In light of the State's foregoing arguments, it is clear that art. 641 was never intended and has never been applied to answer the question of competency for execution. Art. 641 is clearly not "language of an unmistakable mandatory character" as required by Hewitt v. Helms, supra, to create a liberty interest protected by the Fourteenth Amendment. Where there is no specific statute vesting such a right or procedure, a state must fall back to the Ford standard.

Louisiana has done just that. In its jurisprudence, this State has adopted the Ford standard as the standard of competency for execution. Lowenfield, Perry and Allen implicitly recognize the Ford standard. Louisiana has also executed at least one prisoner, Leslie Lowenfield, in light of the Ford standard. Therefore, this petitioner's rights under Louisiana law are no greater than those enjoyed by Leslie Lowenfield. This petitioner's constitutional rights were fully protected when the trial court applied the Ford standard.

VII. THE FORD STANDARD IS DUAL PRONG: BY ADOPTING ART. 641, THIS NEW STANDARD WOULD SUBSUME THE FORD STANDARD PLUS ADD A THIRD PRONG OF REQUIRING A CAPACITY BY THE CONDEMNED INMATE TO ASSIST IN HIS DEFENSE. ASSUMING ARGUENDO THAT THIS HONORABLE COURT WOULD ADOPT ART. 641 AS THE STANDARD TO DETERMINE COMPETENCY FOR EXECUTION, THE STATE RESPECTFULLY SUBMITS THAT ANY ADDITIONAL SAFEGUARDS ARE OUTWEIGHED BY THE STATE'S INTEREST IN FINALITY.

The presumption for Argument VII, as well as the succeeding Argument VIII, is that, arguendo, art. 641 is the standard of competency for post-conviction insanity as a means to stay execution. For the sake of clarity, the State will discuss the following argument by dividing art. 641 according to its two elements. First, the State will discuss art. 641's requirement that the defendant presently have "the capacity to understand the proceedings." Second, the State will discuss art. 641's second requirement that the defendant presently have the capacity "to assist in his defense."

For comparison, art. 641 will be contrasted against the Ford standard as enunciated by Justice Powell in his concurring opinion to Ford. The condemned inmate must know of his impending death, and the reason for it. In the words of Justice Powell, the Eighth Amendment requires that the execution of death row inmates be stayed if they are "unaware of the punishment they are about to suffer and why they are to suffer it." Ford, 106 S.Ct. at 2609.

A. The Ford dual-prong standard is the equivalent of the first element of art. 641, which requires the defendant to "understand the proceedings against him."

In his concurring opinion to Ford, Justice Powell used several key adjectives to help explain the type of insanity necessary before execution would be prohibited by the Eighth Amendment. The inmate must KNOW of his impending death and the reason for it. The inmate must PERCEIVE the connection between his crime and punishment. The inmate must be AWARE of his impending fate. Ford, 106 S.Ct. at 2608-2609.

Justice Powell also cited three states as being similar to the standard he endorsed. The state and its standard was: Florida, the inmate must possess the "mental capacity to UNDERSTAND the nature of the death penalty and why it was imposed" on them; Illinois, "A person is unfit to be

executed if because of a mental condition he is unable to UNDERSTAND the nature and purpose of such sentence"; and Connecticut, an inmate must be "able to UNDERSTAND the nature of the sentencing proceedings, i.e., why he was being punished and the nature of his punishment."

As pointed out, supra, Justice Powell also stated that case law throughout the country supported that the prevailing test is "whether the condemned man was AWARE of his conviction and the nature of his impending fate." Ford, 106 S.Ct. at 2608.

The leading case that gives meaning behind the art. 641 standard is Bennett, supra. Because this case analyzed art. 641 as the standard to determine whether a mentally retarded defendant was capable to proceed to trial on the merits, the case is not the appropriate mechanism by which to test art. 641 as the standard for a post-conviction proceeding to determine competency to be executed. However, because art. 641 has never been applied as the standard for execution competency, the State was left with no other alternative than to use Bennett.

In Bennett on rehearing, the Honorable Justice Dennis addressed the issue that mere existence of mental illness or mental retardation alone was insufficient under art. 641 to stay criminal proceedings against the defendant. Rather, under the two elements of art. 641, the mental illness must be "so severe as to impair a defendant's capacity to understand the object, nature and consequences of the proceedings against him, to consult with counsel in a meaningful way, and to assist rationally in his defense, that defendant is, within contemplation of law, incompetent to stand trial." Bennett, 345 So.2d at 1136-1147. (Citations omitted).

From this excerpt of Bennett, "understand the proceedings" was equated with requiring the defendant to know the object, nature and consequences of the trial's outcome. When applied to a death penalty case, by analogy, "understand the proceedings" must also require the death row inmate to know the object, nature and consequences of the death penalty. This analogy of what Bennett would require in a death penalty setting makes apparent that the first element of art. 641 is identical to what the Ford standard requires.

Both art. 641's first element and the Ford standard would require the inmate to know or understand the death penalty, and the reason why it is being imposed upon him. In

other words, the condemned prisoner would need to know the object, nature and consequences of the death penalty. The terms common in both the Ford standard and the first element of art. 641 - knowledge, perception, understanding, awareness - all focus on the same, basic capacity. Both the first element of art. 641 and the Ford standard require the condemned prisoner to know, perceive, understand and be aware of his death by electrocution for the heinous crime he committed. Therefore, the art. 641 standard subsumes the Ford standard.

If art. 641 is applied to the case at bar, the petitioner under its first element would be required to understand the proceedings. In other words, he must know he will die by electrocution, and he must know the death penalty is being imposed upon him because he murdered five members of his family. This is identical to what the Ford standard requires. As argued previously, the petitioner clearly knows of his impending death and the reason for it. Therefore, the petitioner also clearly "understands the proceedings" as required by art. 641.

B. The second element of art. 641 requires that the defendant have the capacity to "assist in his defense." The State respectfully submits that this second element is unnecessary in a post-conviction proceeding because the issue of guilt or innocence has already been resolved. The question of the petitioner's execution is not IF, but WHEN.

While the second element of art. 641 requiring a DEFENDANT (i.e., an accused) to be able to assist in his defense is constitutionally mandated in a pre-trial setting, as Justice Powell suggests in Ford, infra, it is unnecessary in a post-conviction proceeding to determine competency for execution. When art. 641 was written, it was intended to ensure that a defendant received a fair and impartial trial as required by the Sixth Amendment. The art. 641 standard was intended for pre-trial application when the defendant was still presumed innocent. When that same art. 641 standard is applied post-conviction as a means to determine competency for execution, the standard's underlying purpose -- that is, to ensure that the defendant has a fair and impartial trial -- is no longer served. Instead, the standard is being applied to a condemned murderer whose sentence and conviction have been affirmed on appeal. Michael Owen Perry has already had his day in court. Michael Owen Perry has already had a fair and

impartial trial. Mandating the second element of art. 641 in a post-conviction competency for execution proceeding only defeats the State's compelling interest of finality.

Additionally, there is no support in this State's jurisprudence that the second element of art. 641 is mandated for a post-conviction, competency for execution proceeding. In Perry, supra, this Honorable court required that this petitioner "understand the death penalty" or have the "present capacity to undergo execution." Perry, 502 So.2d at 564. The Fifth Circuit in Lowenfield, supra, adopted the Ford standard in globo. The Allen case, supra, predates art. 641 by 23 years, and while the case cited art. 641's precursor, the Allen court never addressed the issue of a standard. Furthermore, the question presented to the Allen court was framed as "incapable of understanding the proceedings against him." Allen, 15 So.2d at 871. In no case and at no time has this Honorable Court ever suggested that the second element of art. 641 -- requiring the inmate to assist in his defense -- was part of a standard to determine post-conviction competency for execution.

Most persuasive is that this Honorable Court had this petitioner under review in Perry, and yet never cited art. 641 as the standard of competency for execution. The omission becomes even more flagrant because this Honorable Court predicted that a competency for execution proceeding might be necessary. In dicta, this Honorable Court addressed the petitioner's burden of proof in this matter, and required that the execution could not proceed unless the petitioner had the present capacity to "understand the death penalty" or to "undergo execution." Art. 641 WAS NOT cited as authority for these propositions. Also noticeably absent were the words of art. 641's second element: "assist in his defense." In summation, this analysis also shows a fatal flaw in opposing counsel's assertions. Our opponents can cite no Louisiana jurisprudence that requires the condemned inmate possess the capacity to assist in his defense before execution is allowed.

On the other hand, the State's position - that requiring the inmate to assist in his defense unnecessarily hinders the effective administration of criminal justice - is supported directly or indirectly by at least six justices on the highest court in this land. Justices Brennan and Marshall, who have expressly stated that they believe the death penalty is "cruel and unusual punishment" in ALL circumstances, have still, nonetheless, expressed support for the standard as enunciated by

Justice Powell in Ford, supra. Both Justices Brennan and Marshall cited Justice Powell's standard with approval in Johnson v. Cabana, supra. Justice Marshall in Ford also indirectly endorsed Justice Powell's standard in dicta by requiring an execution be stayed if the "prisoner's ability to comprehend the nature of the penalty" or "comprehending the reasons for the penalty or its implications" were absent. Ford, 106 S.Ct. at 2606

Most convincing is Justice Powell's concurring opinion in Ford where he addressed head-on whether a death row inmate must be capable of assisting in his defense before his execution could proceed. He answered with a resounding: NO.

To support his argument, Justice Powell recalled that Blackstone's Commentaries had recorded that execution of an insane man would be prohibited "if after judgment he became of non sane memory, his execution shall be spared: for were he of sound memory he might allege somewhat in stay of judgment or execution." Ford, 106 S.Ct. at 2607 (Court's emphasis.) In commenting on whether a condemned prisoner must be capable of assisting in his defense, Powell stated:

"The first of these justifications (capacity to assist in his defense) has slight merit today. Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal collateral review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other stages of the process whenever the defendant raises substantial claims. Nor does the defendant merely have the right to counsel's assistance; he also has the right to the EFFECTIVE assistance of counsel at trial and on appeal. These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.

In addition, in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself. Our decisions already recognize, however, that a defendant must be competent to stand trial, and thus the notion that a defendant must be able to assist in his defense is largely provided for." Ford, 106 S.Ct. at 2607-2608, (Court's emphasis, footnote and citations omitted).

In a footnote, Justice Powell noted that three states, Mississippi, Missouri and Utah, required that an inmate have the capacity to assist in his defense prior to execution. Powell countered:

"The majority of States appear not to have addressed the issue in their statutes. Modern case authority on this question is sparse, and while some older cases favor the Blackstone view, those cases largely antedate the recent expansion of both the right to counsel and the availability of federal and state collateral review." Ford, 106 S.Ct. at 2608, footnote 3. (Citation omitted).

There is no doubt here that the petitioner has had access to numerous attorneys who have acted in his behalf, an issue which will be discussed in more detail in Argument XI, *infra*. The petitioner's commission of these five violent murders is beyond a reasonable doubt. His sentence and conviction have also been affirmed on appeal by this Honorable Court with writs denied by the United States Supreme Court. Also, unlike common law where execution quickly followed conviction and sentence, in 1987, of the 1,984 inmates on death row, each inmate could expect to spend an AVERAGE of 7 years and two months awaiting execution - a delay directly caused by additional appeals and review unknown and unimaginable at common law. (See Bureau of Justice Statistics, Capital Punishment 1987, Table 10, p. 9.) This petitioner has already been on death row 3 years and 3 months with habeas corpus review still forthcoming. To require that Blackstone's Commentaries of 18th century England be given full weight in late 20th century America seems ludicrous at best.

In the words of Justice Powell, insanity as defined in the context of competency for execution, would mean that the inmate could not understand the proceedings against him, essentially the first element of art. 641. However, this definition of insanity would not include the inmate's capacity to assist in his defense, the second element of art. 641.

Justice Powell also agreed that certain procedural bars, such as not mandating that a condemned inmate be capable of assisting in his defense, are constitutionally acceptable means to serve the State's compelling interest in finality.

In a footnote, Justice Powell explained:

"Moreover, a standard that focused on the defendant's ability to assist in his defense would give too little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until sentence has run its course. Such an implication is false: we have made clear that States have a strong and legitimate interest in avoiding repetitive

collateral review through procedural bars." Ford, 106 S.Ct. at 2608, footnote 2. (Citation omitted).

Therefore, Justice Powell intentionally designed his standard of competency to be executed without requiring that the inmate be able to assist in his defense. Therefore, under Powell's analysis, as adopted by Justices Brennan and Marshall, the Eighth Amendment does not require that the inmate possess the capacity to assist in the defense before he can be legally executed.

Chief Justice Rehnquist in his dissent in Ford also recognized the State's interest in finality. Citing Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950) and Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897) as authority, then Justice Rehnquist stated:

"...Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus, necessitating another judicial determination of his sanity and presumably another stay of his execution." Ford, 106 S.Ct. at 2615 (Rehnquist, J., dissenting.) (Citations omitted).

Justice O'Connor in her concurring opinion in Ford, which was joined by Justice White, also addressed the State's interest in finality. For this very reason, Justice O'Connor stated that the demands of due process are much less post-conviction than they are prior to conviction. She wrote:

"The prisoner's interest in avoiding an erroneous determination is, of course, very great. But I consider it self evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency. By definition, this interest can NEVER be conclusively and finally determined: Regardless of the number of prior adjudications of the issue, until the very

moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary. These difficulties, together with the fact that the issue arises only after conviction and sentencing, convince me that the Due Process clause imposes few requirements on the States in this context." Ford, 106 S.Ct. at 2612. (Court's emphasis, citations omitted).

The State respectfully submits that by expanding the Ford standard to include art. 641's second element of requiring an inmate be capable of assisting in his defense, ignores the State's compelling interest of finality, as recognized most recently in the context of competency for execution by Justices Brennan, Marshall, Powell, Rehnquist, O'Connor and White.

Commentator Weihofen in Mental Disorder as a Criminal Defense (1954) directly addressed the issue of incompetency after death sentence 35 years ago. He said that the common law provided a stay of execution because of post-conviction insanity only in capital cases; there was no similar provision for staying a sentence where punishment was for a term of imprisonment. Weihofen's views provide additional support for Justices Powell and Rehnquist's position that assisting in his defense should not be mandated for a post-conviction proceeding to determine competency for execution. In discussing whether a death row inmate should be required to assist in his defense, Weihofen cited a previous work he had jointly authored:

"To try a person when he is too disordered mentally to defend himself is palpably unfair and can be said to deny him his constitutional rights to a fair trial. But after the trial is over, after the jury has heard all that the defendant may have to say in his defense, after the punishment has been legally assessed and all permissible appeals are finished, no question of fair trial remains. Mental disorder arising thereafter (sic) cannot raise any new question touching guilt or the propriety of the punishment. The suggestion that 'he might have offered some reason, if in his senses, to have stayed these...proceedings' is unconvincing; he has had his chance to show such reasons, and ordinarily he would not now be allowed to reopen the trial to advance such reasons even if he were sane. New facts, such as the issuance of a pardon, will be at least as well known to his counsel as to himself, and can be pleaded for him without his help." Mental Disorder at 464. Citing from: Guttmacher and Weihofen, Psychiatry and the Law (1952), p. 434.

Weihofen suggested that a state legislature should be allowed discretion to determine appropriate procedures as necessary for post-conviction proceedings to determine competency for execution. He wrote:

"There is no constitutional right to a jury trial. There was no right to a jury at common law; the mode of trial was within the discretion of the court. This is not a criminal trial, for guilt has already been determined. The proceeding is a civil one to determine the incidental question of the condemned person's present mental competency to understand the nature and purpose of the punishment to be executed upon him." Mental Disorder at 466. (Footnotes omitted).

Historically speaking, the State's interest in finality was recognized both by the United States Supreme Court and this Honorable Court as far back as the late 19th and early 20th centuries.

In Nobles v. Georgia, supra, the United States Supreme Court in 1897, addressed the issue of whether a condemned inmate, after trial and conviction, was entitled to a jury trial on a present claim of insanity. Answering in the negative, the court quoted Blackstone as providing:

"the rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial and it isn't the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice..." Nobles, 18 S.Ct. at 91.

The Louisiana Supreme Court in ex rel. Lyons v. Chretien, 38 So. 27 (La. 1905) addressed the importance of finality. In that case, the relator had been convicted of murder and sentenced to death. The relator, through his counsel, then petitioned the trial court that he was presently insane, and requested the appointment of a lunacy commission. The relator also suggested that after a trial on the issue of sanity, if it was determined that he was insane, he should be sent to a state mental hospital until cured. The trial court denied the relator's petition. On appeal to the Louisiana Supreme Court, the court held it had no jurisdiction to review the trial court's decision in this matter and therefore, the relator's request for writ of mandamus was denied.

In ex rel. Lyons, the Court cited Act 105 of 1896, the precursor to Act 261 of 1918, discussed, supra, which provided for the interdiction of death row inmates. The court said that the removal of a prisoner under Act 105 was purely at the trial court's discretion.

"In such cases, if the judge be satisfied that the convict has become insane since his imprisonment, he orders the removal of the convict from the penitentiary to the asylum for the insane, to be there detained and treated until he shall recover his sanity. It is obvious that to permit convicts to arrest the execution of sentences imposed on them by demanding, as a matter of legal right, the appointment of medical experts to examine into their mental condition, would be tantamount to granting them the privilege of thwarting the administration of criminal justice for an indefinite time. The act of 1896 does not grant any right to convicts to initiate such proceedings, but the matter is left to the discretion of the warden of the penitentiary. Reasoning from analogy, a similar initiative should be left to the custodian of convicts sentenced to death. If persons under sentence of death appeal to the courts or to the executive department for a suspension of sentence on the ground of alleged insanity, it is discretionary with the court or the executive to take action in the premises. It has been held in other states that in such cases the question is not one of legal right, but of humanity, and that the ruling of the court is not reviewable by appeal or writ of error...If such a ruling be reviewable by this court, then there is nothing to prevent other similar applications and other appeals by relator, resulting in the indefinite postponement of the execution of the sentence of death pronounced against him." ex rel. Lyons, 38 So. at 27-28.

The reasoning in ex rel. Lyons although more than eight decades old, carries true to the case at bar. The question post-conviction is not to re-litigate the petitioner's guilt or innocence. As Justice Powell himself pointed out, the question is not IF the petitioner will be executed. The question is WHEN.

At least one other state, as well, has addressed that state's interest in finality in its positive law. An Alabama statute, which was cited by opposing counsel in their brief, recognized the state's compelling interest of finality. Ala. Stat. §15-16-24 authorizes suspending a condemned prisoner's execution, but only until sanity is restored. The statute further provides:

"This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge. No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict. This section shall not prevent the judge or court from impaneling a jury to try the question of insanity or from examining such witnesses as he may deem proper for guidance."

Thereby, Alabama, in its positive law, has legislatively protected its interest in finality. In a post-conviction proceeding, the death row inmate has one chance and one chance only to raise the question of insanity arising subsequent to conviction as a bar to his execution. That ruling is precluded from any further judicial review. The statute recognizes the prisoner's keen interest of causing unnecessary delay as a means of escaping his punishment.

In Louisiana, if the procedural pre-trial art. 642 is interpreted as applicable post-conviction for proceeding to execution, a conflict with Louisiana's compelling interest of finality similar to the one Alabama attempted to avoid is created. Under the procedural pre-trial art. 642, the death row inmate could repeatedly raise the incompetency issue provided a reasonable ground was established. The State respectfully submits that this is just another example of where the analogy of a pre-trial article for capacity to stand trial to a post-conviction competency to be executed setting breaks down. Such an open-ended statute as art. 642 used in the post-conviction proceedings for execution does not recognize the State's legitimate interest of finality.

Lastly, by mandating the inmate be capable of assisting in his defense, this argument ignores that the inmate's best defense at this stage of his criminal proceedings IS HIS INSANITY. In other words, an inmate can best "assist" his counsel by being insane. Therefore for a truly meritorious claim of insanity post-conviction, sheerly the inmate's presence is the best possible assistance he could offer to his counsel. While mere presence of an incompetent defendant pre-trial could never pass constitutional muster, mere presence of the incompetent condemned inmate post-conviction is the best possible defense.

VIII. ALTERNATIVELY, IF THIS HONORABLE COURT WOULD RULE THAT ART. 641 IS THE STANDARD OF COMPETENCY FOR EXECUTION IN LOUISIANA, THE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT, BECAUSE OF HIS MENTAL ILLNESS, HE HAS BECOME INCOMPETENT SUBSEQUENT TO CONVICTION. EVIDENCE TO THIS POINT CLEARLY SUPPORTS A FINDING THAT THE PETITIONER UNDERSTANDS THE PROCEEDINGS AGAINST HIM AND THAT HE IS ABLE TO ASSIST IN HIS DEFENSE.

For the sake of argument, the State will assume that the petitioner's counsel is correct in that the standard of competency for execution in Louisiana is art. 641. Therefore, under art. 641, the petitioner must prove by a preponderance of the evidence that subsequent to his conviction on October 31, 1985, he has lost the capacity to understand the proceedings and assist in his defense.

The prior Arguments I through VII have all addressed the issue of whether the petitioner understands the proceedings. Because the Ford standard and the first element of art. 641 are identical, the answer under either standard must also be identical. All arguments, supra, that applied to the Ford standard apply with equal weight to the art. 641 requirement to "understand the proceedings." Testimony to this point in the State's brief has shown that Michael Owen Perry doesn't want to die. (R., p. 0760). Dr. Jimenez testified that Perry knew his case might go to the United States Supreme Court and that he could not understand how Charles Manson stays alive when he, Perry, killed "only" five and is sentenced to die. (R., p. 0758). Dr. Kovac said Perry knows if he takes his pills, he'll die; otherwise, he lives. (R., p. 0717). Experts (Dr. Jimenez, R. p. 0531; Dr. Cox, R. p.p. 0556-7; and Dr. Vincent, R. p.0590) all gave testimony that supports a finding that the petitioner is competent to be executed under the first element of art. 641. Michael Owen Perry understands the proceedings: He knows of his impending death and the reason for it.

Because the State has exhaustively covered this issue, the remaining portion of this argument will focus on whether the petitioner is competent for execution under the second element of art. 641. The question the State now intends to answer is whether Michael Owen Perry is capable of assisting in his defense?

A. Under art. 641, the petitioner must prove it is more probable than not that he is incapable, because of his mental illness, of assisting in his defense. Petitioner's stagnant medical diagnosis and stale evidence proves only that his competency is unchanged.

Important for this Honorable Court's consideration at this point is to respectfully be reminded that the petitioner suffers from the same mental illness today as he did during the pre-trial criminal proceedings. No new evidence has been admitted. Petitioner's sanity as far as criminal responsibility and capacity to stand trial are sealed issues. The petitioner, although mentally ill, was determined by two sanity commissions utilizing art. 641 to be competent to stand trial. On October 31, 1985, Michael Owen Perry understood the proceedings against him and was capable of assisting in his defense. That conclusion was affirmed by this Honorable Court in Perry, supra, and was followed by denial of writs by the U.S. Supreme Court.

This brief has already proven that Michael Owen Perry is PRESENTLY capable of understanding the proceedings against him. The ONLY question remaining is whether Michael Owen Perry has lost his capacity to assist in his defense since October 31, 1985. The following argument will prove to this Honorable Court that he has not. Therefore, even measured by the art. 641 standard, the petitioner is competent to be executed and the trial court's ruling must be affirmed.

Because on October 31, 1985, the petitioner satisfied the art. 641 standard, the findings of the sanity commissions deserve a presumption of correctness. In light of this presumption, counsel for the petitioner have produced no new evidence that proves by a preponderance his insanity subsequent to conviction. Much of the evidence (such as medical reports from Central Hospital and Feliciana Forensic Facility) pre-dating the trial, has already been disregarded by two sanity commissions as not sufficient proof of incompetency, and therefore, cannot be considered as establishing post-conviction insanity. The best evidence the petitioner's counsel produces is a biased selection of medical reports from Angola, the latest of which is more than a year old. This evidence is highly suspect as to the inmate's PRESENT mental capacity, which is the ONLY concern here. The petitioner's evidence is simply old news.

However, the most recent evidence - the testimony of witnesses - clearly supports the trial court's finding that the petitioner is competent to be executed. This expert testimony, unlike the petitioner's evidence of stale medical reports, is the latest word on the petitioner's competency, taken at hearings before the trial court on April 20, September 30 and October 21, 1988.

The latest evidence of the petitioner's ability to assist in his defense is most clearly supported by his own actions. Together with his counsel, Michael Owen Perry has voluntarily chosen to forego medication. The result is that his disorder, Schizoaffective Disorder, goes untreated and he manifests symptoms. Dr. Cox testified that Schizoaffective Disorder is a malady similar to diabetes; it can be controlled through medication, but there is no cure. (R., p. 0553). Refusing medicine for Schizoaffective Disorder could be likened to a diabetic who refuses his insulin shots. Untreated diabetes results in the patient's death; untreated Schizoaffective Disorder may result in legal insanity and a loophole to execution. Michael Owen Perry and his counsel have therefore made a calculated decision: by refusing medication, insanity may be induced and the petitioner will be incompetent for electrocution. (R., p. 0551).

If Perry was truly unable to assist counsel, this scheme would be impossible to carry out. Based on these facts, the State respectfully submits that this Honorable Court can reach no other decision than that the petitioner has assisted in his defense. The evidence speaks for itself. Because the actions of this petitioner to assist his counsel are directly aimed at manipulating the criminal justice system, he is clearly assisting in his defense, and therefore, is competent for execution.

B. The "Bennett" test, while in part is clearly irrelevant to determine competency for execution, is flexible, especially if abuse of the criminal justice system is shown.

As stated in Argument VII, supra, Bennett is the leading case on interpreting the two elements of art. 641. However, that tool is awkward and inappropriate in determining competency for execution because it was designed for an entirely different purpose, and was never intended to be used for this purpose. Nonetheless, the State has no alternative but to rely on Bennett IF art. 641 is the chosen standard.

All questions posed by Bennett go to the single purpose of deciding whether a defendant has the mental capacity necessary to receive a fair and impartial trial. Hence many of the questions asked in that context are clearly irrelevant to the execution issue presented by this case. Therefore, the State will only address questions that could reasonably be considered appropriate for determining competency for execution. This will be done in Argument VIII C, infra.

As a foundation to the Bennett argument, the State would like to point out that jurisprudence has stated that the Bennett test even in a pre-trial setting, is a flexible test, especially if rascality is detected on part of the defendant.

This State's jurisprudence which has applied the test as first outlined in Bennett clearly indicates that Bennett is not a rigid, unbending mold into which every defendant must precisely fit, even in the pre-trial setting. For example, in State v. Burnette, 337 So.2d 1096 (La. 1976), this Honorable Court declined to allow a defendant to intentionally defeat the art. 641 standard by his disruptive courtroom behavior. In this case, the defendant had been convicted of armed robbery. In addition to other issues not pertinent here, this court held that the trial court did not abuse its discretion by failing to appoint a lunacy commission to determine the defendant's capacity to stand trial.

In Burnette, the defendant threw an ashtray, striking the trial judge, and repeatedly cursed at the judge. By observing the defendant for three days, the trial court concluded that the defendant was clearly competent to stand trial. This Honorable Court, in supporting the trial court's decision, quoted the words of the trial judge to justify its decision. The trial judge said:

"The court is convinced that there is no insanity involved, that the only thing involved is INTENTIONAL INTENT TO DISRUPT THE JUDICIAL SYSTEM, which the court will not allow and will not subvert it by granting a motion of this type, and I deny the motion." Burnette, 337 So.2d at 1101. (Emphasis supplied).

The Bennett test was again flexible in State v. Rochon, 393 So.2d 1224 (La. 1981). This Honorable Court ruled that even though the Bennett test was not met completely, the trial court still did not abuse its discretion in refusing to issue a mistrial on a claim that the defendant was incapable of standing trial. This Court stated:

"On the basis of the evidence, it is difficult to say that the trial court abused its discretion in concluding that the DEFENDANT'S ABERRANT BEHAVIOR AND APPARENT UNRESPONSIVENESS FORMED A DELIBERATE SCHEME on his part to prevent further proceedings against him. Though the trial court was unable to delve into all the factors enumerated by Bennett, this inability was clearly attributable to the accused, who seemed quite capable of assisting in his own defense. Under these circumstances, the trial court's refusal to order a mistrial on grounds of defendant's incapacity was not erroneous." Rochon, 363 So.2d at 1230.

The Rochon court had affirmed the conviction and life imprisonment sentence of a defendant for aggravated rape. The defendant Raymond Rochon suffered from a psychotic illness, and two sanity commissions had found him incompetent to stand trial. Rochon was sent to the Forensic Division of East Louisiana State Hospital for treatment. Rochon's mental illness was subsequently brought under control by medication, and he was later found to have regained his competency to stand trial. During jury selection, Rochon repeatedly interrupted the proceedings with disruptive and bizarre behavior even after warnings from the trial court. For instance, after being charged with contempt outside the jury's presence, Rochon responded by lifting his shirt and scratching his navel.

During the trial itself, Rochon again interrupted the courtroom proceedings by removing all his clothes in open court. He was again charged with contempt, and he, accompanied by his attorney, was removed from the courtroom to an adjacent room equipped with an intercom system which monitored the courtroom proceedings.

Upon motion of Rochon's counsel for a mistrial, the State requested that the three members of the prior sanity commission re-examine Rochon. Two of three concluded the defendant was capable of standing trial. One doctor admitted he believed the defendant was acting bizarre in a deliberate attempt to halt criminal proceedings against him. Another doctor testified that Rochon was refusing to assist his attorneys, not that he was incapable of assisting his attorneys, and that he was "willfully refusing to cooperate" with the doctors during questioning. On this evidence, the trial court denied Rochon's motion for a mistrial and ruled that he was competent to stand trial. Rochon, 393 So.2d at 1225-1230.

In State v. Lawrence, 368 So.2d 703 (La. 1979) a

slightly mentally retarded defendant had originally been determined incompetent to stand trial, but like Rochon, following treatment, his competency was regained. This defendant had pled guilty to second-degree murder and had reserved his right to appeal the issue of his competency to stand trial. On appeal, this Honorable Court affirmed his conviction, ruling that he had been competent to stand trial. In addressing the issue of whether or not the defendant was capable of assisting in his defense, this Court considered expert testimony which stated that the defendant's silence was intentional on his part. The Court said:

"The facts of the case are not particularly complex, and Lawrence's defense would apparently have turned on whether he knew of the murder plot and on the extent to which he actually participated in it. The defendant's recorded statements were available to the defense, as was the testimony from the trial of David Albert. [(Editor's Note: Albert was charged with first-degree murder in the same case).] The addresses of the principal witnesses Tobe Roberts and David Albert, were known to the defense. Although there is some evidence that Lawrence mistrusts his own memory and must have additional time to decide what response he will make to a given inquiry, the trial court apparently accepted Dr. Osborn's testimony that the defendant COULD COMMUNICATE WITH THE ATTORNEY IF HE WISHED. Moreover, the defense argument that Lawrence would not be able to notify his attorney of distortions or misstatements in the testimony of other witnesses is not such an important consideration if the defendant has already made numerous statements about the events in question." Lawrence, 368 So.2d at 703. (Editor's note; emphasis supplied.)

These three cases - Burnette, Rochon and Lawrence - indicate that the Bennett test is just a guide, and that the facts and underlying motives of the defendant are determinative factors when applying the art. 641 standard.

This jurisprudence supports the State's argument that Michael Owen Perry, at the behest of his counsel, has attempted to manipulate the criminal justice system and use the art. 641 standard as the defense strategy to avoid execution. By voluntarily withdrawing medication, the petitioner can use his mental illness as a means to create legal insanity, if measured by art. 641.

The petitioner is far from stupid. He has normal intelligence, and dropped out of college after earning 13 semester hours of credit. See Perry, 502 So.2d at 522. The petitioner and his counsel know exactly how they can, at this point, escape the petitioner's valid death sentence. The

moretimes Angola personnel report psychotic delusions and hallucinations, bizarre outbursts, rambling speech and loose associations, the greater the petitioner's chances become to be declared legally incompetent for execution. That's exactly why the petitioner's counsel admitted Angola medical reports into the record, supplemented by numerous biased charts in the petitioner's brief. (Pat.'s brief, pp. 38-40, 43-33, 46-49, 71-78a). The sole purpose of these charts is to highlight the proper buzz words: Psychotic, delusions, hallucinations, etc. The charts provide no detailed analysis of the petitioner's mental capacity. An unmedicated Michael Owen Perry has the best shot at defeating the art. 641 standard. That's precisely the reason his attorneys told Perry to stop all medication.

Because of this deliberate attempt to manipulate the criminal justice system, the Bennett test as applied to this petitioner, and as this State's jurisprudence authorizes, should be applied with a flexibility that prevents the system's perversion. Art. 641 would seem to carry with it an underlying presumption that the mental disease or defect that creates incapacity is BEYOND the defendant's own control. Hence, because this petitioner and his counsel have deliberately tried to induce insanity by withdrawing the petitioner's medication, on the authority of Burnette, Rochon and Lawrence, the State respectfully urges this Honorable Court to apply the Bennett test accordingly.

Proof of Mr. Nordyke's deliberate legal strategy to frustrate the art. 641 standard is found in his letter dated March 14, 1988. The trial court denied the State's request to admit that letter into evidence. However, that evidence is sealed, and the State respectfully requests this Honorable Court to open it during this appellate review. (R., pp. 689-691).

C. In the case at bar, petitioner's assisting in his defense is best shown by his own words and actions. Considering the relevant questions "Bennett" asked in regard to art. 641's second element of assisting in his defense, the petitioner is competent to be executed.

The State respectfully suggests that the best indicator of whether or not the petitioner is assisting in his defense should be judged by his own words and actions. Dr. Kovac's testimony that the petitioner has voluntarily chosen to

forego medication AT THE ADVICE OF COUNSEL is clear proof that the petitioner has assisted in his defense. (R., pp.0717-18). Dr. Jimenez testified also that Perry was acting ON THE ADVICE OF HIS LAWYERS by refusing medication. (R., p. 0754). Medical reports further corroborate this scheme between Perry and his counsel. (R., pp. 0180-8). Acting in concert with his counsel, the petitioner systematically has refused medication.

The September 30, 1988 hearing transcripts prove that the petitioner was paying attention to the proceedings and attempted to assist in his defense. During Dr. Kovac's testimony, the petitioner made an outburst and was reprimanded by the trial court.

[By The Court:]

Q. And yesterday did you have a conversation with him?

A. I just mainly sat and listened to he and the social worker discuss.

Q. And what was discussed? What did Mr. Perry say then?

A. I just mainly talking more about how he was feeling and...

Mr. Nordyke:
I think that I need to object to the entire line of questioning for several reasons. And let me go ahead and...

* * *

The Court:
The objection is noted and overruled.

Mr. Nordyke:
To which ruling of the court I would respectfully object and assign error.

Mr. Perry:
Well, I told...

Mr. Nordyke:
Michael, be quiet.

Mr. Perry: Ms. Kovac that the voices make me do it...

Mr. Nordyke:
Mr. Perry, be quiet.

Mr. Perry:
...you know...

The Court:
Talk with your client. I want him here in court if possible but I'm not going to let him interrupt the proceedings. I will take him into the holding cell and we will pipe the hearing into the holding cell so that he can hear. But I'm not going to entertain any more outbursts.

Mr. Ciarrusso:
Thank you.
(R., pp. 0718-0721).

Perry also had the opportunity to "act crazy." As has been pointed out, supra, Dr. Jimenez testified that the petitioner is smart enough to act crazy; he is very much aware of Charles Manson, and many of his expressions were similar to those made by Manson. (R., p. 0758).

The petitioner was called to the stand at the April 20, 1988 hearing. (R., p. 0662). Under direct examination by Mr. Nordyke, Perry performed his role well. Counsel asked suggestively bizarre questions and he was allowed to ramble, and make bizarre and nonsensical statements. Defense counsel had deliberately ordered their client removed from medication in anticipation of this court appearance. (R., pp. 0181-2).

However, under cross-examination by State prosecutor Salomon, the petitioner was able to recall past events and testify to them accurately.

[By Mr. Salomon:]

- Q. And do you have a brother, Ronnie?
- A. He's dead, uh, he's supposed to be coming back in twenty years. He doesn't like to fight.
- Q. How did he die?
- A. He fell from a rig there. You read about that.
- Q. And where was that rig?
- A. Wax Lake. I went -- we picked up the stone like you said.
- Q. Now do you know Zoola? (sic)
- A. Yes, I know her.
- Q. Who is she?
- A. She's the one that kept harassing me at the jail. Now I don't like to cuss or anything 'cause Captain Arnold he taught me that. And he taught me how to be good, you know.
- Q. Is she related to you?
- A. She's my aunt.
- Q. Okay, and whose sister is she?
- A. She's my mother's sister. She's the one that did it first 'cause she was rich. But she didn't know what she was doing.
- Q. Do you know her -- what's her husband's name?

- A. Emery Lyons.
- Q. Okay. And do you know what town they live in?
- A. Welsh, (sic) Louisiana.
- Q. And do you know if you have any brothers and sisters besides Ronnie and Susan?
- A. Uh, I know I got one but I'm not telling you any names. She told me she don't like you because you convicted her of murder.
- Q. Do you know Debbie Perry?
- A. Yes, she's a murderer, too. She never stopped.
- Q. Is she related to you?
- A. Yes, she's my sister-in-law. She's the one that did it, she's the one that...
- Q. And how was she -- who was she married to that makes her your sister-in...
- A. She married my brother, Ronald Adam Perry.
- Q. Okay. And do you remember where the electric chair is?
- A. No, never...
- Q. Have you ever seen it?
- A. I know where mine is, it travels around. I mean I gave that away, I mean, you know, they said it would be back in twenty years, you know. It don't like to cry, it's got a mind of its own. That's a killing son-of-a-bitch. I mean...
- Q. Do you know what death by electrocution means?
- A. Dead like a son-of-a-dead like a doornail, destruction of the world.
- Q. Do you want to die by electrocution?
- A. No, sir, I'd rather be hanged by the neck until dead.
- Q. And why is that?
- A. 'Cause that's what my mother told me to say.
- Q. And do you know, Michael, when your brother was born?
- A. He was born January the 5th, 1954. He was eleven months apart, we're tight, man. And he took the ...
- Q. Michael, did you go to school in Jefferson Davis Parish?
- A. Yes, thirteen years.
- Q. Did you go to a high school?

A. Yes, Lake Arthur High School.

Q. And did you graduate?

A. Sure did, got a turquoise ring. I threw it over the bridge on my way over here so I could dive for it later where they built it, you know, ninety years it took.

Q. Well, what about, Michael, did you play in the band?

A. I was a trumpet player, I'm a member of the Great Pretenders. We make ninety million dollars a day.

Q. And, Michael, besides playing trumpet in the band did you play any sports?

A. I played every football player in the world, every track, everything in the world, sir. That's what I remember. I mean I did it to my best abilities, you know, 'cause I wanted to please the court before I got here.

Q. Michael, do you remember -- have you ever been to Washington, D.C.?

A. I been there three times. I went to the Library of Congress every time.

Q. And do you remember the Annex Hotel?

A. That's where I stayed for two weeks, the best time of my life.

Q. Do you remember how long or where is that...

A. I was supposed to spend six weeks but that's where they arrested me at, that's where you got me at. I remember you hired the secret service for me, you know.

Q. Do you remember what floor your room was on?

A. Oh, it was on the first floor.

Q. Do you remember -- did you have any T.V.'s?

A. Oh, I had all kinds of T.V.'s, man, that's when I heard about the murder victims.

Q. And how many T.V.'s do you remember having?

A. Oh, man, about seven.

Q. Okay. Do you remember how big those T.V.'s were?

A. They were portable.

Q. Okay. And do you remember where you got them from?

A. At the hock shop.

Q. Okay, do you remember how far that was from the hotel?

A. A half a block.

Q. And how did you get from Louisiana to Washington D.C.?

A. In my mother and daddy's car, they let me use it one time. That was the best car they ever had. And my daddy wants it back.

Q. What kind of car was that?

A. Oldsmobile, that's all I know about it for now.

(R., pp. 0677-78; 0678a; 0679).

Mr. Nordyke also apparently acknowledges that his petitioner is assisting in his defense. Petitioner's counsel, however, took this point to the extreme. Mr. Nordyke took away any remaining shred of the petitioner's human dignity when he called his client "an exhibit."

Mr. Nordyke:
We will call Mr. Perry as an exhibit.

The Court:
If you would step up, please.

Mr. Salomon:
As an exhibit or as a witness?

The Court:
He's being called as a witness. If you would raise your right hand and be placed under oath, please.

Mr. Perry:
I can't do that but I'll try my best.

The Court:
That's good enough.

(R., p. 0661; emphasis supplied).

Instead of properly calling the petitioner to the stand as a witness, Mr. Nordyke preferred to classify his client as "an exhibit," as if a court of law was a side-show at the circus. This behavior of Mr. Nordyke is inappropriate. Yet it does establish defense counsel's recognition that Perry is assisting them in his defense.

To better effectuate the petitioner's assistance with the defense, Mr. Nordyke had sought his appointment as "do-gooder" in the petitioner's behalf. (R., p. 002). This method gave Mr. Nordyke the power to control the petitioner's medication, and thereby, increase his odds of winning against the death penalty. All the petitioner's medical and legal interests were then vested in one man whose only goal in the case at bar is to beat the death penalty at all costs. That is precisely why, in the "best interests" of his client, Mr. Nordyke ordered the petitioner to refuse medication, despite

medical doctors who had advised otherwise. (R., pp. 570-571; 086). This refusal is the means to induce a calculated insanity and escape execution. The "do-gooder" role played by Mr. Nordyke also would be totally undercut if the petitioner was truly unable to assist. This relationship between Michael Owen Perry and Keith Nordyke only proves that Perry has been assisting Mr. Nordyke in his defense. The orders were made, and the orders were carried out; without the latter, the former would be wasted breath.

Subsequently, Mr. Nordyke has been removed as "do-gooder." (R., p. 0003). The State respectfully submits that this was but another example of defense counsel Mr. Nordyke's attempting to manipulate the criminal justice system.

The test in Bennett for assisting in one's defense includes the following questions: "whether he (the defendant) is able to recall and relate facts pertaining to his actions and whereabouts at certain times...; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements...; whether, if necessary to defense strategy, he is capable of testifying in his own defense..." Bennett, 345 So.2d at 1138.

Other Bennett questions such as locating witnesses, maintaining a consistent defense, simple decision-making as to pleas, and mental deterioration under stress of trial, are clearly irrelevant when the issue is competency for execution. Therefore, these questions will not be discussed.

As far as the questions asked by Bennett that may apply, the State respectfully contends that Perry has done these things. Under cross-examination by Salomon, supra, the petitioner showed he could recall past events. Perry's interruption of Dr. Kovac's testimony, supra, proved he was following the proceedings, and could tell his attorneys his side of the story. And Perry testified in his own behalf. Therefore, under the relevant questions of Bennett, the petitioner is assisting in his defense.

Expert testimony by Drs. Cox and Vincent indicated that the petitioner could not meet the Bennett criteria. (R., pp. 0738, 0629). As argued previously, the flaws in such a test, designed for a pre-trial application on the question of whether or not the defendant is competent to stand trial, but used to a post-conviction application on the question of whether or not the condemned prisoner is competent to be

executed, are apparent. The Bennett test as written would defeat the whole purpose of Justice Powell's concurring opinion in Ford. That is, to define insanity IN THE CONTEXT of which it arises. Bennett defines insanity as a suspension to standing trial; it does not define insanity as a stay to execution. The experts have been using a tool for a purpose for which it was not designed. Hence, the value of their testimony here is highly suspect and is not an accurate indicator of how well the petitioner was assisting in his defense. The more accurate indicator is to examine their reports from their observations of Perry including Perry's comments and answers to their questions, rather than their legal conclusions.

The trial court also instructed the experts to examine the petitioner according to the Ford standard; hence they were never instructed on what, if any, of the Bennett criteria applied.

D. Opposing counsel has attempted to manipulate the criminal justice system by ordering the petitioner to forego medication in spite of their knowledge that the petitioner responds favorably to medication. Now those same attorneys want to benefit from that order by petitioning this Honorable Court to find that their client cannot assist in his defense.

As stated supra, the petitioner's counsel is manipulating the criminal justice system by advising their client to stop all medication in a conscious attempt to fail the art. 641 standard. The doctors have testified that the petitioner responds to the regular administration of Maldol (one shot a month plus oral medication three times a day). (R., pp. 0753-4). The doctors also have testified it is in the petitioner's best interest to be medicated. (R., p. 0557). However, petitioner's counsel is so vehemently opposed to the death penalty that they are willing to sacrifice their client's sanity for their own moral crusade of opposing the death penalty at all costs.

At the same time that opposing counsel have ordered Michael Owen Perry to stop all medication, they now complain that Perry cannot assist them in his defense. They know the petitioner responds to medication. (R., p. 0557). They know that the petitioner's mental state only improves with medication. (R., p. 0557). They know that the medication is

in the petitioner's best interest. (R., p. 0557). Opposing counsel now has the audacity to petition this Honorable Court that the petitioner cannot assist them in his defense. In other words, opposing counsel knows that medication will better enable Perry to be of assistance, yet they order him to stop medication, and then they petition this Court to declare him incompetent because he cannot assist in his defense. The State respectfully requests that opposing counsel not benefit from such a perversion of the criminal justice system.

The only purpose behind recommending the medication be foregone is to defeat the death penalty. Opposing counsel are gambling that by advising the petitioner to refuse his medication, they can thereby induce insanity and "win one" against the death penalty. In effect, petitioner's attorneys have taken it upon themselves to sentence the petitioner to spend the rest of his normal life - perhaps 40 years or more - incarcerated and insane, by advising him to forego the advances of medical science to control his mental illness, or worse yet, to deny medication during this competency proceeding, but give him medication after the death penalty has been avoided. In contrast, this same counsel in their brief described in nauseating detail the horrors of the world that torment the insane. Ironically, they invite their client to enter that world by inducing insanity. This anomaly casts doubt on the sincerity of counsel's "confessed" conviction in support of the historical reasons why insane prisoners were not executed. Petitioner's counsel will sacrifice their client's sanity as long as they are victorious in suspending or perhaps extinguishing, a validly imposed death sentence.

Obviously, the respondent is not so foolhardy as to suggest it is in the petitioner's "best interest" to be electrocuted. However, the choice was not one the respondent made. The State Legislature and the petitioner made that choice together. The State Legislature joined the majority of the states in this nation when it enacted the death penalty in R.S. 14:30. The petitioner forfeited his life when he, in cold-blood, executed five members of his family. The respondent's duty now to the people of Louisiana is to seek retribution and deterrence. That will only be achieved by the petitioner's execution.

F. Alternatively, if this Honorable Court decides the petitioner is incapable of assisting in his defense, the State contends that petitioner is not incapable, but rather has refused to assist in his defense by voluntarily withdrawing his medication. Art. 641's underlying presumption is that "incapacity" must be beyond the defendant's control.

In *Rochon*, supra, this Honorable Court made a distinction between incapable of assisting in one's defense, as required by art. 641, as opposed to refusing to assist in one's defense. At this point, the State respectfully submits that Michael Owen Perry is not incapable of assisting in his defense under art. 641. He has REFUSED to assist in his defense.

Perry has chosen to forego ordered medication in order to convince a judge he is crazy. (R., p. 0754). Testimony clearly indicates that Perry only improves with medication. (R., p. 0557). Therefore, when Perry made the decision to stop his medication, at that point, he REFUSED to assist his counsel further in his defense.

The *Rochon* case, supra, has many similarities with the case at bar. There the defendant had a mental illness that was controlled by medication. There the defendant embarked on a deliberate scheme including aberrant behavior and unresponsiveness. There this Honorable Court ruled that the defendant was not incapable under art. 641 of assisting in his defense; he had refused to assist in his defense.

Dr. Jimenez reported she had found refusal on Perry's part.

[By Mr. Salomon:]

Q. Doctor, I don't mean to seem as I'm delving off but is there a difference -- or I mean do you have an opinion on whether in this universe there is a thing known as free will or that each of us as individuals have a volitional ability or a nature to our character?

Mr. Nordyke:

Judge, this is philosophy as opposed to to psychiatry now, I believe. And I would object to the question. I'm not sure it's relevant at all to whether or not Michael is sick.

Mr. Salomon:

Your Honor, if I might respond. I think that a question of free will in this case goes to the heart of the matter before the Court. And there is a distinct purpose in mind that I have in asking the question. I have a follow up that

comes and I think the Court will recognize addresses the central question we're confronting today.

The Court:

What might that follow up question be, Mr. Salomon?

Mr. Salomon:

The followup question would be to Dr. Jimenez is there a difference between her conclusion of Michael Perry is unable to assist versus Michael Perry refusing to assist counsel. And free will would determine more in line that he is refusing to assist his counsel rather than he is unable to assist. A semantic distinction on the surface but one I think that is valid in the long run.

The Court:

I overrule the objection.

Q. Doctor, do you have any opinion or belief in any person whether they're mentally ill or suffer from any kind of disorders, personality, Schizoaffective, do we have free will?

A. Yes, sir.

Q. And can you see my distinction? Is it possible that Michael's ambivalence, as you term it, is more in line with a refusal to cooperate, a refusal to assist, rather than, as you put it, he is unable to assist?

A. There is a certain degree of refusal and there's also a certain degree of inability. It's very difficult, and that's the reason why I suggested that I would feel more comfortable if this man were better medicated and better, uh, in a better frame of mind than he is now. Although he does understand that he killed his family and he does understand that he is getting the chair for that crime.

Q. Okay. And you have made those determinations pursuant to your interview that he understands why he's being penalized why he incurs and is going to suffer the penalty of death?

A. Yes, sir, based on my evaluation that's the conclusion I arrived at.

(R., pp. 0532-34; emphasis supplied).

Dr. Vincent reported that the petitioner had refused to cooperate for purposes of testing.

[By Mr. Salomon:]

Q. All right, so, what does this indicate to us?

A. Again, the size is very small, I wasn't getting tremendous cooperation at that point. As you can see, it's a stick figure as opposed to the normal drawing of a person with arms and body and so forth. (R., p. 0612, emphasis supplied).

Perry also refused to assist Dr. Vincent with other testing. (R., p. 0630). This evidence, buttressed with the fact that Perry has refused medication, clearly supports a finding that the petitioner has refused to assist in his defense. The State respectfully submits that any other finding demeans the criminal justice system. As stated, supra, art. 641's second element of requiring a defendant to assist in his defense presumes that this incapacity is beyond the defendant's own control. Here the petitioner can control his capacity to assist in his defense by regularly taking his medication. Allowing the petitioner to withdraw medication and thereby, become incapable of assisting counsel allows the petitioner to manipulate the criminal justice system.

In the Gray case, supra, the State at page 49 went into the mental condition of Jimmy Lee Gray in great detail. Gray's mental illness was far more severe than the petitioner's, and yet, he was declared competent for execution under Mississippi law. Most importantly, Mississippi's standard of competency for execution includes assisting in one's defense. Mississippi required that the condemned inmate possess "the intelligence requisite to convey such information to his attorneys or the court" as necessary in assisting in his defense. Gray, 710 F.2d at 1054. Using this standard the Fifth Circuit rejected Gray's claims he had become insane subsequent to conviction. The State respectfully submits that Perry, as well, has the ability to assist in his defense, proven by the expert testimony and his own words and actions.

Twelve jurors found Michael Owen Perry guilty beyond a reasonable doubt of viciously and mercilessly killing his mother, father, two teen-age cousins and an infant nephew in their homes. They unanimously sentenced him to death after finding two aggravating circumstances. Seven justices of this Honorable Court unanimously affirmed the conviction and sentence on appeal. Yet the petitioner, if allowed, will turn the whole system into a farce. Simply put, if he stops the medication, he stays his execution. His inducement of insanity becomes his loophole to execution.

The State respectfully requests this Honorable Court to allow justice be done, and affirm the trial court's ruling that Michael Owen Perry is PRESENTLY competent for execution.

IX. THE TRIAL COURT'S JUDGMENT THAT PETITIONER IS COMPETENT TO PROCEED TO EXECUTION WAS A CORRECT AND VALID DETERMINATION OF PETITIONER'S PRESENT COMPETENCE.

As previously set forth in detail, the evidence conclusively points to the fact that Michael Owen Perry is competent to proceed to execution. It was upon this evidence that the trial court found it "obvious" that the petitioner was competent to proceed to execution, concluding that:

"The defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason he is to suffer said punishment." (R. at 0005).

The trial court also determined that this level of competence sufficient to proceed to execution was maintained through treatment. In accord with this finding the trial court further concluded that:

"Defendant's competency is achieved through the use of antitropic or antipsychotic drugs, including Haldol, and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication, as to be prescribed by the medical staff of said Department and if necessary, to administer said medication forcibly to defendant and over his objection." (R. at 0005).

This judgment, and subsequent orders of the trial court, is best characterized as a dual holding. The first holding concludes that Michael Owen Perry is presently competent to proceed to execution. The second holding orders Perry to receive continuing treatment so that his present competence shall be maintained. This second holding of the trial court implicitly expresses its belief that Perry is incompetent without treatment. In other words, the trial court's order that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment.

The first prong of the court's decision, holding Michael Owen Perry competent to proceed to execution, is correct because, in rendering a decision on an individual's competence to proceed to execution, the trier of fact must look only to the individual's present condition. It is clear under Louisiana law that a determination of competence is to be made as to the individual's present condition only, regardless of how that condition is maintained.

A. The trial court properly focused on the petitioner's present competence.

As reflected in the record, the trial court concluded that Perry is competent for purposes of execution because of his awareness of the punishment he is to suffer and the reason he is to suffer said punishment. The court based its determination of present competence on the written evidence and oral testimony of the witnesses. Petitioner contends that the court erred in this determination, however, because it based its order on petitioner's medicated condition. In other words, Perry alleges the court erred in concluding that he is "competent to proceed because his condition of competence, as presented to the court for determination, was based solely on medication. The error in this belief is clearly shown in Hampton, supra, which requires that in determining questions of competence, a court look to the individual's present condition only.

In Hampton, the Louisiana Supreme Court was faced with the question of whether a defendant, whose mental capability was maintained only through the use of prescribed medication, was competent to stand trial. The evidence in Hampton overwhelmingly stressed that the defendant's competence to proceed was based solely on the continued administration of medication, including testimony from a member of the sanity commission that "[a]t the present time, she's (the defendant) legally sane, and she is legally sane due to medication." Hampton, at 312. The trial court in Hampton found the defendant "synthetically sane," yet determined that capacity induced by medication was insufficient to proceed to trial.

In rejecting the trial court's determination, the Supreme Court mandated that in assessing an individual's competence to proceed, the trier of fact look only to that individual's competence as it presently exists:

"That this condition (competence to proceed) has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science." Hampton, at 312.

Hampton requires that the trier of fact look only to an individual's competence as presented for determination, not to how this competence is achieved or maintained.

The requirement that a court look only to an individual's present condition in determining competence was reaffirmed in State v. Collins, 381 So.2d 449 (La. 1980). In Collins, the defendant was found not guilty of attempted armed robbery by reason of insanity, and was remanded to the East Louisiana State Hospital. Seven months later, the defendant claimed his mental illness was in remission, and petitioned the court for a hearing on the question of his release.

As in Hampton, the evidence overwhelmingly stressed the importance of treatment in maintaining defendant's competence. The evidence showed:

"[i]f the (defendant) followed the medical regimen recommended by his psychiatrists (including daily medication) he would not pose a danger either to himself or to society if he were released ... if the (defendant) stopped taking his medication he would probably suffer a relapse and in those circumstances he could pose a danger to himself and others." Collins, at 450.

In light of this evidence, the trial court denied defendant's release, claiming a reluctance to release "an unstable individual who has the propensity to remit." Collins, at 450.

In vacating the trial court's ruling, this Court cited Hampton in saying, "the fact that the remission (of the illness) had occurred because of the administration of medication was of no legal significance." Collins, at 451. The court went on to state that:

"[w]e cannot ignore the fact that the relator at present poses no danger to society or to himself merely because the improvement in his condition was caused by the very treatment which he was sent to East Louisiana State Hospital to receive. To do so would be to disregard the fact that the assiduous application of the knowledge of medical science can indeed transform patients into contributing members of society." Collins, at 451.

The court then authorized the release of the defendant based upon his medically maintained level of competence.

The holdings of Hampton and Collins were applied by the First Circuit in State v. Boulmay, 498 So.2d 213 (La. App. 1st Cir. 1986). In Boulmay, the defendant, who had been found

not guilty by reason of insanity of armed robbery and two counts of attempted murder, petitioned for a hearing to determine whether he could be released on probation. The appellate court was confronted with a record replete with evidence that the defendant presently posed no danger to society or to himself, and that this condition was achieved by the treatment he had received. Faced with this evidence, the appellate court found that the trial court erred in "refusing to accept that 'chemical sanity' may be a legitimate consideration in favor of probation." Boulmay, at 215. The court went on to hold the fact that the defendant was only "chemically sane" did not preclude his release from the detaining facility.

Inmate Perry now stands before this Honorable Court alleging error in the trial court's adherence to the principle, iterated in the above succession of jurisprudence, that a determination of competence is to be based on an individual's present condition only. Perry would have this court believe it necessary to reverse this line of cases and overturn the trial court's determination of competence to proceed to execution because his condition was based on medication.

This is an unreasonable request, for it simply ignores the foundation upon which these decisions rest. Competence in an unmedicated state is no different than competence in a medicated state. The condition itself is the same in each; that is, whether petitioner's competence is or is not based on medication, the fact remains that Michael Owen Perry is aware of the punishment he is to suffer and why he is to suffer said punishment.

As the courts have acknowledged, it is ridiculous to fail to recognize competence maintained through treatment simply because it is maintained through treatment. To do so would disregard that fact that medical science can treat a condition so that an individual is able to function as any other. Should Michael Owen Perry be allowed to forestall his execution simply because his awareness is maintained through treatment, while another death row inmate possessing the same mental awareness, absent treatment, would be forced to proceed to death?

This court has recognized in Hampton and its progeny that this loophole to a valid sentence cannot exist. It would

be folly to believe that Perry would take this same stance in opposition to Hampton if the question concerned his competence to be released on probation or parole.

Hampton and progeny undoubtedly hold that a determination of competence to proceed to execution must be based on the individual's present condition. It is irrelevant to the determination whether the individual's competence is or is not maintained through medication.

Accordingly, the State asserts that the trial court's judgment concluding that Michael Owen Perry was competent to proceed for the purpose of execution was a valid determination of petitioner's present competence.

X. THE TRIAL COURT'S JUDGMENT ORDERING THE MEDICAL STAFF OF THE DEPARTMENT OF CORRECTIONS TO CONTINUE PETITIONER ON TREATMENT SO AS TO MAINTAIN HIS COMPETENCE TO PROCEED TO EXECUTION IS VALID.

As previously set forth, the trial court first concluded that Michael Owen Perry is competent to proceed to execution in that he is aware of the punishment he is to suffer and the reason he is to suffer said punishment. In addition to this initial holding, the trial court also determined that this level of competence was achieved and maintained through the use of treatment; in other words, without treatment, Michael Owen Perry is incompetent to proceed to execution. The trial court therefore ordered the medical staff of the Department of Corrections to continue the petitioner's treatment, in the exercise of the Department's physician's professional judgment, to maintain Perry's competence.

The reasons supporting the validity of the first prong of the trial court's decision were detailed in Arguments I through VIII, supra. It is clear under our law that a determination of competence to proceed must be based on an individual's present condition only. It is also clear that it is irrelevant to this initial determination of competence whether treatment will be necessary to maintain the individual's competence. See Collins, supra. What is necessary is that the individual's condition, as presented to the court for determination, be of a level of competence sufficient to fulfill the applicable standard.

The second prong of the trial court's holding ordering treatment of Michael Owen Perry is valid for three reasons. The first is that in all provisions of Louisiana law dealing with judicial determinations of competence, ranging from pre-trial determinations to judicial commitments, the individual submits himself to treatment upon a determination of the necessity of treatment (i.e., a determination of incompetency). The raising and questioning of competence (or incompetence) acts as an implicit submission on the part of the individual to treatment when the court determines treatment is necessary to achieve and maintain competence (i.e., that the individual is incompetent without treatment).

The second reason is the duty and inherent power vested in the trial court by the Louisiana Constitution and

Code of Criminal Procedure. Each of these bodies of law grants to courts certain inherent powers and duties regarding their effective operation and administration of justice. To accept petitioner's position is to ignore a court's inherent power to effectuate and enforce its valid judgments. The trial court must necessarily possess the inherent power to order treatment when deemed necessary to maintain competence in a proceeding where a death row inmate asserts incompetence as a bar to his execution.

The third reason is that the trial court's order comports with both federal and state constitutional requirements. The order is not violative of any constitutional provision; in fact, the order fulfills the State's constitutional obligation to provide medical assistance to those individuals lawfully in its custody.

A. The trial court's order requiring treatment is valid because Perry implicitly submitted to treatment upon asserting and proving he is incompetent (or competent only while treated).

Michael Owen Perry presented voluminous evidence to the trial court in an attempt to prove his incompetence to proceed to execution. Having had the trial court determine him competent to proceed to execution only while maintained on treatment (conversely, incompetent if not maintained on treatment), Perry now asserts that the issue of his competence to proceed is a distinct issue from that of treatment. The State contends that this assertion is incorrect. Once the question of an individual's competence is raised, whether he be a civil committee, an accused, or a convicted felon, the necessity of treatment is a concomitant issue which must be addressed by the reviewing court.

The State's argument is bolstered by the pervasive scheme set forth in Louisiana law concerning treatment in competency determination proceedings. A review of our State's legislative schemes dealing with competency determinations clearly shows that whenever a court is presented with the question of an individual's competence, treatment is required when a determination of incompetence is made (i.e. competence only when treated). This principle applies to all individuals in all competency proceedings, whether they be judicial committees, pre-trial detainees, inmates, insanity acquittees, probatioers, or parolees.

The review of the statutory schemes dealing with determinations of competence and the necessity for treatment begins with the law dealing with commitments in civil situations. Under Louisiana law, a court is required in civil situations to order an individual committed and treated, whether by emergency certificate or by judicial commitment, when it is determined that the individual is incompetent or in need of treatment to maintain competence. That is, the issue of treatment is subsumed within a finding of incompetence. There is no requirement that the court which concluded incompetency must then conduct an additional inquiry to determine the need for treatment. Simply put, the finding of incompetency is a finding that treatment is necessary, and therefore authorized.

La. R.S. 28:53, dealing with admissions by emergency certificates provides in part:

"K. Patients admitted by emergency certificate may receive medication and treatment without their consent, but no major surgical procedure, or electroshock therapy may be performed without the written consent of a court of competent jurisdiction after a hearing." (Emphasis supplied).

La. R.S. 28:55, dealing with judicial commitments, provides in part:

"I. A patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent, but no major surgical procedures or electroshock therapy may be performed without the written authority of a court of competent jurisdiction after a hearing." (Emphasis supplied).

R.S. 28:53 provides for the medication and treatment of individuals without their consent as a corollary to their having been admitted by emergency certificate. The statute provides no procedure for a separate judicial determination of the necessity or power to order medication or treatment. Subsumed within the emergency certificate is the necessary submission by the individual to receive whatever treatment or medication is deemed necessary to achieve or maintain competence.

This same principle is true of R.S. 28:55, which provides for the medication and treatment of individuals without their consent as a corollary to their having been

judicially committed. Upon determination by the court that a person is subject to commitment, the treatment facility is necessarily and automatically given the power to treat and medicate the individual, even without his consent. Again, the statute does not provide a separate mechanism to the individual to question treatment; the question of treatment is necessarily subsumed within the court's power to order commitment.

The statutes provide that upon commitment, a person can be required by the court to receive treatment, even without consent, provided a hearing is held and treatment is deemed necessary (i.e., a conclusion of incompetence). It is noteworthy that these persons are not charged with a crime, much less convicted of the murders of five persons and sentenced to die in the electric chair. Yet our law provides that these persons may be required to undergo treatment, without their consent, upon a concurrent determination that treatment is necessary to achieve or to maintain competence.

In situations involving pre-trial or pre-conviction detainees where the question of competence to proceed is raised, the question of treatment is again subsumed within the court's power to determine competence.

La. C.Cr.P. art. 648, dealing with the procedures for treatment after a determination of mental capacity or incapacity, provides in part:

"A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant ... for custody, care, and treatment, as long as the lack of capacity continues." (Emphasis supplied).

As in the civil proceedings, treatment must be administered upon a determination of incapacity. The only predicate for this order is that a determination of incompetence be made by the court. Once it is determined that treatment is necessary to achieve or maintain the individual's competence, the court necessarily has the power to order treatment of the individual, if not the duty.

Again, it is important to note that the court can order treatment of these individuals detained pre-trial even

though at the time they are shrouded in the veil of innocence. Nevertheless, treatment of pre-trial detainees is concurrent with the court's determination of the individual's incapacity to proceed. If determined to be necessary to achieve or maintain competence, treatment of a pre-trial detainee without his consent is required.

When a criminal defendant receives a verdict of not guilty by reason of insanity, the court must order the individual committed for custody, care and treatment.

La. C.Cr.P. art. 654, dealing with commitments of persons acquitted on grounds of insanity, provides in part:

"When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant ... for custody, care and treatment.

When a defendant is found not guilty by reason of insanity in any other felony case, the court shall ... promptly hold a contradictory hearing ... If the court determines that the defendant cannot be released without danger to others or himself, it shall order him committed ... for custody, care and treatment." (Emphasis supplied).

La. C.Cr.P. art. 657, dealing with the discharge or release of insanity acquittees, provides in part:

"After the hearing ... the court may order the committed person discharged, released on probation subject to specified conditions for a fixed and determinate period, or recommended to the state mental institution." (Emphasis supplied).

Under these provisions, a defendant in a capital case, found not guilty by reason of insanity, can be forced to receive treatment simply based upon the judgment that he was insane at the time of the commission of the offense. The court can also require a defendant in a non-capital case, found not guilty by reason of insanity, to receive treatment if it finds after a contradictory hearing that the defendant cannot be released without danger to others or to himself.

It is clear that the question of treatment of a defendant found not guilty by reason of insanity is contained within a decision on an individual's competence. The court can order treatment of these defendants, without their consent, upon a finding that treatment is necessary to achieve or maintain the individual's competence.

La. R.S. 15:574.4 provides that parolees may be required to conform to certain conditions. Among those conditions specifically listed in sub-section H is:

"H.(11) Submit himself to available medical or psychiatric examination or treatment or both when ordered to do so by the probation and parole officer."

Submission to treatment is inherent within the parole officer's determination of its necessity. If a parole officer can require a parolee to submit to treatment upon questioning his competence, cannot a death row inmate be required to submit to treatment having voluntarily chosen to provoke inquiry into and a ruling upon his competence?

Finally, the court has the power to order prisoners confined in penal institutions to receive medication subsequent to a predicate determination, pursuant to a hearing, that the treatment is necessary to prevent harm or injury to the inmate or others.

La. R.S. 15:830.1 provides in part:

"A. Whenever a mentally ill or mentally retarded inmate refuses treatment ... the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided."

Under this statute, the court can order treatment of an inmate, without his consent, simply upon a finding that treatment is necessary to prevent harm or injury to the inmate or others.

The principle pervasive throughout this legislation is that the determination regarding the necessity of treatment is subsumed within the determination of competency. Whether the question of competence is raised by the court, the State, the individual, or a third party in any of the above situations, Louisiana law clearly incorporates treatment within a proceeding determining competence. The questioning of competence necessarily acts as an implicit submission by the individual to treatment when it is deemed necessary. Some of the above situations are where the individuals have not acted to provoke inquiry into competency. In regard to Perry, he has provoked inquiry into his competency. It should therefore be clear that he has taken a voluntary act which submits himself

to the power of the law and the court. Yet petitioner stands before this Honorable Court claiming that any question of treatment is separate from a determination of his competence; therefore, it was outside the scope of the trial court's power to order treatment concurrent with its determination of incompetency (i.e., that treatment was necessary). To accept this premise, however, is to ignore the scheme set forth by the previously cited legislation.

As repeatedly stated, the questioning of an individual's competence, in all of the settings discussed, acts as an implicit submission on that individual's part to the treatment, if it is necessary to achieve or maintain competence. The State acknowledges that the legislature has not expressly applied this principle to a death row inmate who asserts incompetence to proceed to execution. Yet the express application of this "implicit submission" principle in the legislation dealing with all competency determinations provided for by law impliedly recognizes its application to the unprovided for area of competency determinations regarding death row inmates.

While true that the death penalty is a "special situation," its nature as a "special situation" gives even greater credence to the State's assertion that a claim of incompetence to proceed to execution is an implicit submission to treatment, if it is deemed necessary to maintain or achieve competence. Is a death row inmate afforded a loophole to execution by proving incompetence to proceed, thereby thwarting the imposition of a lawful sentence because the question of treatment is separate from that of competence? Should a death row inmate be allowed to stay his sentence and at the same time prohibit treatment which, in the opinion of experts, maintains his competence to proceed and is the recommended form of treatment for his particular illness? The State asserts that Louisiana law does not provide for this type of manipulation of the criminal justice system. The law implicitly requires that a death row inmate asserting incompetence submit to treatment if it is necessary to maintain his competence.

B. The trial court's order requiring treatment of Michael Owen Perry is valid since it is within the Court's inherent power and duty.

The trial court's order of treatment to maintain Michael Owen Perry's competence to proceed to execution is

valid since it is within its inherent power and duty. The Louisiana Constitution of 1974 and the Code of Criminal Procedure endow courts with certain inherent powers, authorities and duties.

La. Const. Art. 5, §2 provides in part that:

"A judge may issue writs of habeas corpus and all other needful writs, orders, and process in aid of the jurisdiction of his court."

La. C.Cr.P. Art. 3 provides:

"Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions." (Emphasis supplied).

La. C.Cr.P. Art. 16 provides:

"Courts have the jurisdiction and powers over criminal proceedings that are conferred upon them by the constitution and statutes of this State, except as their statutory jurisdiction and powers are restricted, enlarged, or modified by the provisions of this Code."

La. C.Cr.P. Art. 17 provides:

"A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." (Emphasis supplied).

Each of these constitutional and codal provisions recognizes the necessary and inherent powers the court must possess in order to control and adjudicate criminal proceedings. A closer look at each provision illuminates the court's inherent power to order a death row inmate to undergo treatment so that his competence to proceed to execution can be maintained.

La. Const. art. 5, §2 empowers the court to issue all needful orders in aid of its jurisdiction. It is important to note that La. R.S. 15:567 imposes a mandatory, continuing duty on the court of original jurisdiction to issue a warrant of execution subsequent to the dissolution or termination of any stay, reprieve or other intermittent proceeding.

Pursuant to this continuing jurisdiction, and its jurisdiction vested through the competency determination, art. 5, §2, vested the trial court with the power to issue needful orders in aid of its jurisdiction. Having determined petitioner's competence is achieved and maintained through the use of treatment, the trial court ordered treatment so that competence sufficient to proceed to execution could be maintained. The power to issue orders in aid of its jurisdiction allowed the trial court to order treatment for the petitioner so that the court could fulfill its obligation, as court of original jurisdiction, to issue a warrant of execution.

La. C.Cr.P. art. 3 provides the court, in the absence of a specific procedure, the power to fashion a procedure consistent with the spirit of the Constitution, the Criminal Code, and other legislation. This power was recognized in State v. Eros Cinema, Inc., 264 So.2d 615 (La. 1972) as the power to make "specific pronouncements" under the court's "general authority for establishing procedural guidelines in the absence of specific legislative procedural rules." Eros, at 620. As previously acknowledged, the legislature has not expressly provided specific provisions regarding determinations of competence and determinations of treatment for death row inmates. Since no provision exists, the court is empowered to formulate its own procedure for ordering a death row inmate to receive treatment, as long as the procedure is consistent with the State's Constitution, Criminal Code and other statutory laws.

The State asserts that the trial court's ordering treatment of Michael Owen Perry was within its power under Article 3 to establish a procedure for determining the necessity of treatment for a death row inmate who is asserting incompetence to proceed. As exhaustively set forth, the legislature has enacted numerous procedures for determining competence in a wide range of settings. In each of these settings, whether it be in a civil setting, a pre-trial detainee, an inmate, an insanity acquittee, or as a condition of probation for parolees, the power to order treatment is concomitant to the trial court's determination that treatment is necessary.

Whether treatment is mandated because the individual is gravely disabled, is a danger to himself or others, is incapable of proceeding to trial or because treatment is

required as a condition of probation, it is clear that the power to order treatment is incorporated within the determination of competence. The trial court's ordering treatment is clearly consistent with this procedure. The trial court first was presented with the question of petitioner's competence to proceed to execution. The court found petitioner competent, but found this competence was maintained only by treatment. The court, therefore, ordered petitioner treated in the future so that his competence could be maintained.

The procedure is exactly in line with the procedures provided by the legislative enactments dealing with competency determinations in any setting. The trial court is first presented with the question of the individual's competence. Upon determining that treatment is necessary to achieve or maintain a sufficient level of competence, by whatever standard is applicable in that situation, the trial court necessarily has the power to order treatment, even without the individual's consent.

The State asserts that the trial court acted within the powers bestowed on it through La. C.Cr.P. art. 3, by creating a procedure whereby a death row inmate can be ordered to receive treatment, even without his consent, so that his competence to proceed to execution can be maintained. The order of treatment was valid under art. 3 because it is consistent with all Louisiana legislation dealing with determinations of competence and the necessity of treatment. That is, an individual's assertion of incompetence before a court submits the individual to the court's power to order treatment if it is necessary to achieve or maintain competence.

La. C.Cr.P. art. 16 vests courts with the jurisdiction and powers over criminal proceedings that are conferred on them by law, except as these powers are restricted by provisions of the Code of Criminal Procedure. The law clearly conferred on the court the power to render a determination on petitioner's competence to proceed to execution. Yet the law also conferred on the court the power to order treatment if necessary because of its power to determine the antecedent question of petitioner's competence.

This power, if not an express legislative pronouncement, is at least implicit because of Louisiana's scheme for treating individuals pursuant to competency determinations. Louisiana

law clearly empowers courts to order treatment of individuals simply because of the nature of the proceeding. It would be incongruous to suggest that the law would grant a court the power to render a judgment on an individual's competence and determine that treatment is necessary, yet render that court powerless to order treatment. The State therefore asserts that art. 16 further buttresses the validity of the trial court's order of treatment because Louisiana law implicitly conferred on the court the power to order treatment of petitioner so that his competence to proceed to execution could be maintained.

The final express recognition of the trial court's inherent power to order treatment of a death row inmate in order to maintain his competence to proceed to execution is found in La.C.Cr.P. art. 17. Art. 17 recognizes that courts inherently possess all powers necessary for the exercise of their jurisdiction and the enforcement of their lawful orders, including the power to issue orders necessary in aid of its jurisdiction. Art. 17 further recognizes the duty of the trial court to control criminal proceedings so that justice is done.

This inherent power of courts to carry out lawful orders was recognized by this Honorable Court in State v. Mims, 329 So.2d 686 (La. 1976), in which the Court stated:

"Where the law is silent, it is within the inherent authority of the court to fashion a remedy which will promote the orderly and expeditious administration of justice." Mims, at 688.

Art. 17 inherently vests in the trial court all powers necessary for the enforcement of its lawful orders. Michael Owen Perry was lawfully convicted of murdering five persons, and was lawfully sentenced to death. As previously stated, this court has a statutory duty to set an execution date. (See La. R.S. 15:567.) In order to fulfill the duty, the trial court ordered that petitioner's competence to proceed to execution be maintained through treatment.

To deny that the trial court possesses the power under art. 17 would frustrate the expeditious administration of justice by allowing petitioner to elude the court's enforcement of its validly imposed sentence of execution. To prevent this frustration of justice, art. 17 empowers the trial court to order treatment of Perry so that his competence to proceed to execution may be maintained.

The State asserts that to accept petitioner's proposition that a treatment determination is a wholly separate question from the question of competence is to ignore the court's inherent power to control criminal proceedings. To allege that the trial court had no power to order treatment is not only contrary to all legislation dealing with determinations of competence in other settings, it also disregards the express grants of power inherently endowed in all courts. The State contends that the trial court's order of treatment was valid, as within its inherent power and consistent with state law, so that Michael Owen Perry's competence to proceed to execution shall be maintained.

C. The determinations of competence and treatment are so "inextricably intertwined" that a determination of incompetence or competence maintained through treatment necessarily subsumes the question of treatment.

This notion that petitioner implicitly submitted to the trial court's power to order treatment, by asserting his incompetence and having an impartial trier of fact determine the necessity of treatment, is also supported by a Federal court decision. Also see Washington v. Harper, 44 Cr. L. 4189, cert. granted March 6, 1989. The United States Court of Appeals for the Fourth Circuit recently dealt with the question of the connexity between a determination of incompetence to stand trial and the resulting necessity for treatment.

On rehearing in United States v. Charters, 863 F.2d 302, (4th Cir. 1988), (judgment stayed pending disposition of the petition for writ of certiorari) 44 Cr. L. 4178 (by Brennan, J., Feb., 14, 1989), the court was presented with the government's attempt to administer antipsychotic medication to an individual, without his consent, who had been judged incompetent to stand trial and ordered confined. On original hearing, a three member panel of the court held that the questions were distinctly and wholly separate. After initial determination of incompetence, the Court stated that when an inmate later manifested an objection to medication, a second, elaborate judicial proceeding was required.

This proceeding consisted of a two stage process. The process was described by the Charters court on rehearing as follows:

"In the first stage, an adversarial factfinding process would be used by the court to determine whether the inmate was mentally competent to make a rational decision respecting his own best interests -- whether to accept the medication or not. If found competent in this respect, his objection must be honored. If found incompetent, the court would then make a 'substituted' judicial judgment of the inmate's 'best interests.'" Charters, at 307.

This process required a separate judicial determination of the individual's competence to make a decision regarding treatment apart from the initial judicial determination of the individual's competence. Within this second determination, the court was to determine if the individual was competent to make a rational decision in his own best interests regarding the refusal of treatment. If it was determined that he could, the inquiry was to stop at that point. If it was determined the individual was not competent to make a rational decision regarding treatment, the court was required to make a "substituted" judicial determination of the inmate's best interest regarding treatment.

On rehearing, an en banc panel of the Fourth Circuit completely rejected this approach. In so doing, the court recognized that the very nature of each determination rendered them inextricably intertwined. This excerpt from Charters, though lengthy, will clarify this relationship between the questions:

"By requiring a preliminary factual determination of the inmate's mental competence to decide his own best interests in receiving or declining medication, this regime would pose an unavoidable risk of completely anomalous, perhaps flatly inconsistent, determinations of mental competence by different judicial tribunals. It must be recalled that Charters (as would be all similarly situated inmates), has already been properly adjudged 'so mentally incompetent as to be unable to understand the [criminal] proceeding against him or properly assist in his own defense' under former 18 U.S.C. §4244. That solemn judicial adjudication still stands. The proposed regime contemplates that without altering that extant determination of incompetence to assist in his defense he might now be judicially determined nevertheless competent to determine his own best interests in receiving or refusing medication. While in theory there may be a difference between the two mental states, it must certainly be one of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals. To suppose that it is a distinction that can be fairly discerned and applied by even the most skilled judges on the basis of an adversarial fact-finding proceeding

taxes credibility. The resulting threat of wholly inconsistent or highly anomalous adjudications is palpable, and poses high risks to the integrity and trustworthiness of the court's already perilous involvement -- out of necessity -- in the adjudication of complex states of mental pathology." Charters, at 310.

As recognized by the court, the question of treatment is by nature incorporated into the question of competence. To suggest a distinction exists would, in the court's words, tax credibility. It is the nature of these questions that guided the court in Charters to hold that once a determination of incompetence was made, it would be left to the judgment of the treating physician whether medication was necessary. This judgment by the medical personnel need not be presented before a court to determine whether the individual could be treated without his consent. The determination regarding treatment is automatically placed with the medical experts simply upon a finding of incompetence and a determination by the doctors that treatment was necessary.

The State asserts that the reason which guided the Charters court on rehearing is that which guided Trial Judge Hymel in ordering treatment for Perry in order to maintain his competence. As recognized in Charters, the trial court was necessarily confronted with the question of treatment when it determined that Perry was incompetent without treatment. Since the questions of competence and treatment are necessarily intertwined, the court was required to order treatment when it determined treatment was necessary to maintain Michael Owen Perry's competence to proceed to execution.

D. Submission to the trial court's power to render a determination on a death row inmate's competence to proceed to execution acts as an "implied waiver" to any objection the inmate may have to treatment.

By their very nature, the processes and procedures for determining competence are different than those involved in a full blown criminal trial, including the necessary waiver of certain constitutional rights. In Buchanan v. Kentucky, ____ U.S. ____, 107 S.Ct. 2906, ____ L.Ed.2d ____ (1987), the United States Supreme Court held that the state's use of a psychiatric report used solely to rebut the defendant's "mental status" defense did not violate the defendant's Fifth or Sixth

Amendment rights. The court found that the use of testimony from a psychiatric examination did not violate the defendant's right against self-incrimination when used to rebut the defendant's assertions and proof of incompetence. The court also found no violation of the defendant's Sixth Amendment right to counsel when counsel actively participated in the entirety of the proceeding.

These principles were examined by the Fifth Circuit Court of Appeal in Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988). In Schneider, the court described the principles approved in Buchanan as follows:

"We have described the principle approved in Buchanan - a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind -- as involving a 'waiver' of Fifth Amendment rights ... Whatever the label, the principle reflects the courts' attempts to maintain a 'fair state-individual balance,' a value underlying the Fifth Amendment privilege itself." Schneider, at 576. (Emphasis supplied).

The court went on to support its view that the assertion of incompetence acted as a waiver of the Fifth Amendment's privilege against self incrimination by saying:

"It is unfair and improper to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. The principle also rests on 'the need to prevent fraudulent mental defenses.'" Schneider, at 576.

The court in Schneider also spoke in similar terms of a "waiver" regarding the defendant's Sixth Amendment's right to counsel. Initially, the court stated that:

"Given our rejection of Schneider's Fifth Amendment claim, however, his Sixth Amendment objection may not succeed either. In Williams v. Lynaugh, 809 F.2d 1063 (5th Cir. 1987) we treated both Fifth and Sixth Amendment objections as waived when the prosecution's psychiatric evidence was properly limited to rebuttal of defendant's mental - status evidence." Schneider, at 578. (Emphasis supplied).

The court went on to reject the defendant's objections in stating:

"Schneider cannot complain of the mere fact that the examination extended beyond the subject of competency. He can only object to the use of

that broadened examination against him; and he is held, as a matter of policy if not of 'knowing and intelligent' waiver to have invited that use by introducing mental-status testimony of his own. If maintenance of a 'fair state-individual balance' requires this conclusion under the Fifth Amendment, Schneider may not circumvent this policy through the Sixth Amendment." Schneider, at 578.

Each of these cases stands for the same proposition: an assertion of incompetence, and subsequent adjudication of that issue, necessarily results in the foregoing of the privilege against self incrimination and aspects of the right to counsel. This foregoing of certain rights applies to an individual's submission to the court's power to order treatment upon an assertion of incompetence and resulting determination of the necessity of treatment (i.e., incompetence without treatment). Whether characterized as a logical recognition, as in Buchanan, that an assertion of incompetence mandates the relinquishment of certain rights, or as a waiver of rights, as characterized by Schneider, the premise is the same. An assertion of incompetence requires the submission of the individual to the court's power to adjudicate a true determination of competence, including the submission of Fifth and Sixth Amendment rights or privileges. Nowhere is this more true than in the submission of the individual to the court's power to order treatment upon an assertion of incompetence and a determination that treatment is necessary to achieve and maintain competence. Just as a defendant cannot assert a privilege against self incrimination or a right to counsel to thwart a true determination of competence by the trier of fact, that same individual cannot deny the court's power to order treatment if it is determined necessary to achieve and maintain competence.

Is a death row inmate to have the power to emasculate the court by negating its power to carry out a lawful sentence of execution by refusing treatment even though he has asserted incompetence, presented evidence in support thereof, and had a judicial determination rendered ordering that treatment is necessary to achieve and maintain the inmate's competence? The State asserts that the pervasive scheme in Louisiana law dealing with treatment and competence determinations as concomitant issues says no. The State asserts that the inherent power of the court says no. The State asserts that Charters, Buchanan, and Schneider say no. What each of these bodies of law does require is that an assertion of incompetence

to proceed to execution requires an implicit submission by that inmate to the trial court's power to order treatment, if it is determined that treatment is necessary to achieve and maintain the inmate's competence to proceed.

E. Competence maintained through the use of treatment is valid competence for the purpose of proceeding to execution.

The trial court determined that Michael Owen Perry is competent to proceed to execution in that he is aware of the punishment he is about to suffer and why he is to suffer said punishment. The court also determined that this level of competence was maintained through the use of medication; therefore, it ordered petitioner to undergo treatment. This treatment is to ensure that Michael Owen Perry's competence be maintained at a sufficient level so that his sentence may be carried out. The State unequivocally asserts that competence maintained through the use of treatment is valid so as to allow petitioner's execution to occur.

The Louisiana Supreme Court has recognized the validity of competence maintained and achieved by treatment in both pre-trial and post-trial settings. In the pre-trial context, the Supreme Court has determined that medically induced and maintained competence is sufficient competence so that a criminal defendant may be brought to trial.

In Hampton, the Louisiana Supreme Court held that "a defendant whose mental capability was maintained only through the use of a prescribed medication was competent to stand trial." Hampton, at 311. The Court went on to hold that the "likelihood that defendant would relapse if use of medication was interrupted did not bar defendant from proceeding to trial." Hampton, at 311. The underlying reason for this holding, as previously discussed, is that in determining competence:

"...the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science." Hampton, at 312.

In State v. Lawrence, 368 So.2d 699 (La. 1979), a case involving a defendant accused of second degree murder, the court was faced with the question of whether a defendant, whose

competence was maintained only through the use of medication, was sufficiently competent to be brought to trial. In approving of the validity in proceeding to trial based on medically maintained competence, the court stated that a defendant can be "required to stand trial even if his mental capacity is maintained only through the use of prescribed drugs." Lawrence, at 702.

In each of these pre-trial settings, the court validated an individual's proceeding to trial based on competence maintained through the use of treatment. Each of these individuals was presumed innocent until proven guilty; yet the court refused to grant either defendant a loophole from proceeding to trial because their competence was maintained only through the use of treatment. Should petitioner, whose competence to proceed is maintained by treatment, be granted a loophole to execution, having been tried and convicted for murdering five persons, while an individual who is presumed innocent be required to proceed to trial when his competence is maintained in the same fashion? The State asserts that the answer to this question, under Hampton and Lawrence, is that competence maintained through treatment is valid competence so that a death row inmate can proceed to execution.

In a post-conviction setting, the Supreme Court has validated competence maintained or achieved through treatment as the basis for releasing a defendant who was incarcerated after being found not guilty by reason of insanity. In Collins, the court stated that a defendant found not guilty by reason of insanity could be released pursuant to La. C.Cr.P. art. 657, even though his competence was achieved only through the administration of medication. The court stated that his competence could not be deemed invalid, "merely because the improvement in his condition was caused by the very treatment which he was sent ...to receive." Collins, at 451.

The First Circuit reaffirmed the Supreme Court's approval of medically maintained competence in Boulmay. In Boulmay, the defendant, who was held after being found not guilty by reason of insanity, sought to be released pursuant to La. C.Cr.P. art. 657. The court held that the fact that the defendant's competence was only maintained through treatment did not preclude his release from incarceration. In so holding, the court, citing Hampton, stated that, "to look beyond the defendant's condition and find him incompetent

because that condition was chemical (sic) induced would be to erase improvement produced by medical science." Boulmay, at 214-215. The court went on to say that, "remission occurring because of the administration of medication was of no legal significance." Boulmay, at 215.

In Collins and Boulmay, the courts seized the opportunity to iterate that if competence maintained through medication is sufficient to go to trial, it is sufficient to be released into society. In Perry's case, the trial court continued this logical extension by ordering that competence maintained through treatment is also competence sufficient for a death row inmate to proceed to execution.

The State contends that the trial court was correct in following this line of jurisprudence. The State asserts that a death row inmate can be executed even though his competence is maintained only through the use of treatment. If a pre-trial defendant, who is afforded heightened constitutional protections, can be brought to trial even though his competence is maintained by treatment, a convicted inmate can be required to fulfill his sentence of death even though his competence is maintained only through medication. This same analogy holds true in the case of defendants seeking release on probation or parole, those found not guilty by reason of insanity, and civil committees who seek release on medically maintained competence.

Petitioner's status as a death row inmate does not remove him from this sphere. Michael Owen Perry's competence, maintained through treatment, is valid so that he may proceed to execution.

This reasoning regarding the validity of competence maintained by treatment being valid competence so that a death row inmate is competent to proceed to execution is supported by Justice Powell in his concurring opinion in Ford. As Justice Powell states:

"[T]he State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim (of incompetence to proceed to execution). Rather, the only question raised is not whether, but when, his execution may take place." Ford, at 2610.

Justice Powell further opines that if a death row inmate, determined to lack the mental faculties necessary to proceed to execution, is restored to competence sufficient to proceed to execution, the State is free to execute him. Such view is in accord with the Louisiana Supreme Court's view on competence achieved or maintained through treatment; therefore, if a death row inmate's competence is maintained through treatment, the State is free to carry out the inmate's lawful sentence of death.

Accordingly, the State asserts that Michael Owen Perry's competence to proceed to execution, that is maintained through the use of treatment is valid competence so that Perry's sentence of death may be carried out.

F. The trial court's order of treatment satisfies procedural due process protections because the question of treatment is subsumed within a competency determination.

To reiterate, the trial court empaneled a sanity commission to assist in the determination of Michael Owen Perry's competence to proceed to execution. After the presentation of all evidence by the experts, by the State, and by Perry, the court determined that Perry was presently competent to proceed to execution. The court further found that Perry's competence was achieved by treatment; that is, that Perry was incompetent without treatment. Therefore, the court ordered the Department of Corrections to continue Perry on treatment in order to maintain his competence.

Petitioner contends that the trial court's ordering treatment violated procedural due process in not affording him two separate hearings. Petitioner believes due process required an initial hearing on his competence. Upon a determination that he was incompetent (only competent while treated) Perry claims he was then entitled to a second hearing on the court's authority to order treatment as opposed to his competence to refuse treatment.

The State asserts that the court's ordering treatment upon determining Perry incompetent (i.e., competent only if treated) satisfied due process. The reason for this is because a proceeding determining competence necessarily subsumes a determination on the necessity of treatment. Once the requisite procedural protections were provided by the court in

addressing the question of Perry's competence to proceed (see arguments I-VIII; XI), Perry could be required to submit to treatment.

It is intenable to think a court, upon determining incompetence (or competence maintained through treatment) cannot order treatment, but must initiate a second separate proceeding to determine if it can treat the inmate. Neither state nor federal law require such an absurd result.

What is required by procedural due process in this context is that Perry submit to treatment upon a determination that he is incompetent (or competent while treated). Pursuant to the submission to treatment theory there is no need for a second hearing. The proposition of only hearing comports with due process. It is supported by: 1) policy considerations; 2) Louisiana law; 3) Federal jurisprudence; and 4) other States' law.

1) Policy Considerations

The policy underlying the requirements of procedural due process require that a determination of the process Perry was entitled to regarding the trial court's ordering treatment must be based on the nature of the decision being made. And what is the nature of the court's decision? First, that Perry is presently competent. Second, that Perry is competent only when treated; that is, incompetent if not treated. In light of these decisions, the court ordered treatment.

Petitioner contends due process required a second hearing on the question of treatment after having been found incompetent. To accept this position, however, simply ignores the nature of competency proceedings regarding determinations of incompetence and orders of treatment.

First, requiring separate hearings on each question impedes judicial economy and poses an unavoidable risk of completely inconsistent determinations of mental competence.

Second, the questions of incompetence and treatment are necessarily and inextricably intertwined. A distinction between competence to proceed to execution and competence to refuse treatment is certainly a fine line. To believe that a distinction could be drawn by the most skilled psychiatric professionals, much less a trial judge, would, quoting Charters, supra, "tax credibility."

Third, a death row inmate simply should not be afforded a loophole to execution by having a separate hearing on his ability to refuse treatment. Once determined incompetent (or competent while treated) the inmate has submitted himself to treatment. Justice certainly is not served by allowing a death row inmate the opportunity, in a second hearing, to refuse treatment that is beneficial to his mental health and maintains his competence to proceed to execution. It would certainly be an absurd result to allow a death row inmate, whose competence to proceed is maintained by treatment, to escape his sentence by refusing treatment, while an inmate with the same level of competence, yet not on medication, would be required to proceed to his death.

It must be remembered that the procedural requirements mandated by due process are not a rigid set of rules applied in the same fashion regarding every state action. As recognized by Justice Powell in his concurring opinion in *Ford*, "due process is a flexible concept, requiring only 'such procedural' protections as the particular situation demands." *Ford*, at 2610 citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, at 902, 47 L.Ed.2d 18 (1976).

A determination of the process required in a certain situation or proceeding is necessarily based upon the nature of such situation or proceeding. As recognized by the United States Supreme Court:

"[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made" *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, at 2507, 61 L.Ed.2d 101 (1979).

The ultimate decision in a competency proceeding is determining whether the individual is competent or incompetent. Procedural due process is satisfied when upon a determination of incompetence (or competent if treated) the death row inmate submits to treatment.

2) Louisiana law

The scheme employed by the trial court in ordering Perry treated, pursuant to its determination that Perry was competent when treated, is the same process pervasive throughout Louisiana law regarding treatment of individuals pursuant to competency determinations. (See argument X, A.)

The procedural protection afforded a civilian, a pre-trial detainee, an inmate, or an individual on probation or parole is the same protection afforded Michael Owen Perry regarding treatment pursuant to a determination of incompetence. The question of treatment is resolved within an inquiry into competence before a judicial officer; that is, a single hearing is necessary to determine incompetence. Once determined incompetent, the individual must submit to treatment.

Once the court determines that the individual is incompetent (or competent while treated), the law requires that the individual submit to treatment. No provision exists in Louisiana law which separates competency determinations from questions of treatment.

Since Louisiana law subsumes a question of treatment within a competency proceeding, the trial court's ordering treatment of Perry upon determining him incompetent (or competent while treated) comports with due process. Michael Owen Perry was afforded far in excess of the procedural due process protection required in the proceeding determining his competence (see argument I-VIII, XI). Once the requisite procedural protections were provided by the trial court in addressing the question of his competence to proceed, Perry can have no due process objection to treatment that achieves and maintains his competence.

As recognized by the trial court and Louisiana law, a determination of incompetence and a question of the necessity of treatment are inextricably intertwined. It is ludicrous to suggest that a court, after providing procedural due process to an individual, can render a determination of incompetence (or competence maintained by treatment) yet have its "hands tied" by not being able to order treatment without first providing another hearing on that question.

3) Federal jurisprudence

The principle, espoused by the trial court and Louisiana law, that treatment of an individual is mandatory upon a determination of incompetence (or that treatment is necessary to maintain competence) was recognized by an en banc panel of the Fourth Circuit Court of Appeals in *Charters*, *supra*. As previously set forth, the court in *Charters* was

faced with the government's attempt to administer antipsychotic medication without the consent of an involuntarily committed psychiatric patient who had been found incompetent to stand trial and ordered confined.

The question presented in Charters was stated as follows:

"What procedural protection is constitutionally required to protect the interest in freedom from bodily intrusion that is retained by an involuntarily committed individual after a prior due process proceeding that significantly curtails his basic liberty interest." Charters, at 306 (Emphasis supplied).

The court initially addressed this question by citing the inmate's only interest as being "afforded protection against arbitrary and capricious government action," of treating the individual with antipsychotic drugs. Charters, at 305.

The court went on to find that the individual's commitment, based on his incompetence, fully comported with due process. Having determined that the initial determination of incompetence comported with due process, the court rejected the scheme proposed by Charters regarding forcible treatment; that is, that a second adversarial hearing be held on the individual's competence to refuse treatment.

In rejecting this claim, the court stated that:

"All factors considered, we are satisfied that the basic regime proposed by the government for making the medication decision in issue is adequate, if properly administered, to comply with due process requirements. We do not believe that adequate protection here requires, substitution of the pre-medication adjudicative regime proposed by Charters." Charters, at 312.

The government scheme adopted in Charters for treating individuals who are incompetent, or competent only if treated, is nearly identical to the scheme utilized by the trial court and all other Louisiana legislation dealing with competency determinations. Charters required that upon a determination, at a proceeding comporting with procedural due process requirements, that an individual is incompetent (or requires treatment to maintain his competence) the individual can be treated without his consent. This is the scheme that the trial court followed in ordering treatment for Michael Owen Perry.

Upon determining Perry competent only if maintained on

treatment, at a hearing which clearly comported with procedural due process, the trial court ordered Perry treated, even without his consent. No second hearing was necessary; no elaborate scheme was required to determine Perry's "competence" to refuse treatment. Due process was satisfied in ordering treatment when the trial court made a determination, at the conclusion of the hearing, that Michael Owen Perry's competence was maintained by treatment.

4) Other States Laws

The trial court's ordering Perry treated upon determining him incompetent (or competent only if treated), is nearly identical to the scheme for ordering treatment of death row inmates pursuant to competency determinations that was adopted by Florida in response to Ford. In Ford, the United States Supreme Court rejected the Florida procedures for determining a death row inmate's competence to proceed to execution.

In response to the rejection of its competency determination procedures, Florida adopted Florida Rule of Criminal Procedure, 3.811, which provides in part:

(b) Disposition on finding of incompetency.

(1) If the court determines that the prisoner is not mentally competent to be executed, the court shall stay the execution and order the prisoner committed to a Department of Corrections mental health treatment facility. The order of commitment shall contain the following:

(a) Findings of the fact relating to the issues of competency to be executed and involuntary hospitalization.

(c) Any other written submissions relative to the prisoner's competency to be executed received by the court.

(2) The treatment facility shall admit the prisoner for hospitalization and shall retain and treat the prisoner.

(3) Within thirty days of receiving any report from the treatment facility's administrator, the court shall consider that report and any written submissions from the parties and may allow the presentation of oral argument. If the court determines that the prisoner continues to be incompetent to be executed, the court shall order continued hospitalization and treatment for a

period not to exceed one year. The procedure shall be repeated prior to the expiration of each one-year period of hospitalization.

(4) If at any time after hospitalization under this rule the court decides that the prisoner is competent to be executed, the court shall enter its order so finding and shall vacate its stay of execution.

(c) Effect of adjudication of incompetency to be executed; psychotropic medication.

(1) An adjudication of incompetency to be executed shall not operate as an adjudication of incompetency to consent to medical treatment or for any other purpose unless such other adjudication is specifically set forth in the order.

(2) A prisoner who, because of psychotropic medication, has sufficient ability to understand the nature and effect of the death penalty and why it is to be imposed upon him or her shall not be deemed incompetent to be executed simply because his or her satisfactory mental condition is dependent upon such medication.

Having been legislatively addressed, there is no doubt the intricacies of the Florida scheme for treating death row inmates is more complex than the scheme used by the trial court in ordering treatment for Perry. Yet the heart and substance of the trial court's order of treatment is virtually identical to the Florida scheme, legislatively adopted in response to Ford, for treating death row inmates whose competence to proceed to execution is maintained or achieved through treatment.

The foundation of each scheme is that upon an assertion of incompetence, and subsequent adjudication that treatment is necessary to achieve or maintain the inmate's competence to proceed, the inmate automatically and necessarily is required to submit to treatment.

An analysis of the Florida scheme bears these similarities out. The first step in the Florida procedure is that upon a court's determination that the prisoner is not mentally competent to be executed, the court "shall" stay the execution and order commitment to a Department of Corrections treatment facility. Fla. R. Cr.P. 3.811(b)(1)(emphasis supplied). This order of commitment must contain findings of fact relating to the order of involuntary treatment. Fla. R.Cr.P. 3.811(1)(1)(a).

The procedure further obligates the treatment facility to retain and treat the prisoner. Fla. R.Cr.P. 3.811(1)(2). This rule of procedure imposes a duty on the treatment facility to treat a prisoner, who is determined to require treatment, so that his competence to proceed to execution may be achieved and maintained.

This is a continuing duty to treat, as Rule 3.811 requires the maintenance of treatment even if the prisoner is determined to still be incompetent after a fixed period of time. Fla. R.Cr.P. 3.811(b)(3). Rule 3.811 also provides that the court may at any time after treatment vacate its stay of execution if the court decides the prisoner is competent to be executed. Fla. R.Cr.P. 3.811 (b)(4).

Rule 3.811 also expressly recognizes the court's ability to order and require treatment without the prisoner's consent. Fla. R.Cr.P. 3.811 (c)(1). This provision expressly recognizes the power to order treatment without consent within the adjudication of incompetency. As long as the order of treatment without consent is specifically set forth in the order of adjudication it is acceptable.

Finally, Rule 3.811 provides that a prisoner's competence, maintained through the use of treatment, is not invalid competence to proceed to execution simply because such competence or condition is dependent on treatment. Under Florida law, competence based solely on medication is valid so that a death row inmate may proceed to execution.

A comparison between the trial court's actions and the procedures required under Fla. R.Cr.P. 3.811 reveals a close parallel.

The trial court ordered continuing treatment for Perry upon determining his competence to proceed was achieved only when treated. This treatment was to be administered by the medical personnel of the Department of Corrections, based upon their professional judgment. This order of treatment, is analogous to the Florida provision requiring treatment upon a determination of incompetence.

The trial court's ordering treatment, even without Perry's consent, finds further credibility in Florida's provision allowing treatment without consent, so long as that

order is expressly provided in the original adjudication of incompetence. Florida's provision allows an order of treatment, even without consent if deemed necessary by the court, to be rendered within the initial determination of incompetence. No provision exists requiring a separate hearing on this question.

The Florida provision is simply a legislative recognition of the principle espoused in Louisiana by Hampton and its progeny. That is, competence maintained solely through the use of treatment or medication is valid competence for the individual to proceed, whether it be to trial or to execution.

The procedure employed by the trial court in ordering treatment of Michael Owen Perry comports with the procedural protections mandated by due process in this context. The validity of the scheme employed in ordering treatment upon a determination of incompetency (or that treatment is necessary to maintain competence) is in accord with the procedural due process protection required by Louisiana law, federal law, and Florida law (which was created in response to Ford).

The question of treatment is necessarily subsumed within the question of competence. This means that once the requisite procedural protections are afforded in determining that an inmate is incompetent (or requires treatment in order to maintain his competence), the court is required to order treatment, without the need for a subsequent hearing. The procedural protections mandated are those required in the competency hearing. Once provided, a determination of incompetence necessitates treatment. A second hearing would be superfluous.

Nevertheless, petitioner contends that his procedural due process protections were violated by the trial court's failing to adhere to the letter of La. C.Cr.P. art. 648 and R.S. 15:830.1. The State counters that petitioner is in error for two reasons. First, these two provisions are inapplicable to this proceeding. Second, the trial court's order of treatment satisfied the essence, if not the letter, of the requirements of each provision.

Petitioner asserts that either La. R.S. 15:830.1 or La. C.Cr.P. art. 648 are the provisions applicable to treating death row inmates pursuant to a determination that the inmate

is incompetent. Addressing La. R.S. 15:830.1 initially, it is readily apparent that this statute is inapplicable to this proceeding.

The reasons that R.S. 15:830.1 is inapplicable are numerous. First, the statute regulates the relationship only between the Department of Corrections and the inmate. La. R.S. 15:830.1 was enacted and intended for situations where the penal institution, and not the court, seeks to treat an inmate for his safety or for the safety of others connected with the institution. The statute, by its express terms and placement within the statutes, simply does not govern a proceeding where the question of competence to proceed to execution, and the necessity of treatment to maintain such competence, are adjudicated.

The second reason the statute is inapplicable in this proceeding is that its underlying purpose is a tool for the administration of prisons. This is reflected in its placement within the section of our revised statutes dealing with the Department of Corrections. The statute is simply a tool for ensuring that the best interests in administering the institution are carried out.

Third, the statute is designed to prevent the arbitrary and capricious administration of treatment to inmates by the prison staff. The statute provides a procedure which prevents prison administrators from treating an inmate, for its own purposes, for prolonged periods of time without prior court approval that the inmate is in need of treatment (i.e., that he is incompetent in the prison context - a danger to himself or others).

Fourth, the statute operates on the presumption that the inmate has neither actually nor constructively consented to the treatment. In Perry's case at present, we believe that he has consented to treatment by provoking this competency proceeding.

Finally, the standard used in the statute for requiring treatment is that treatment is necessary to prevent harm to the inmate or to others. The statute, by its express terms, cannot regulate treatment required to maintain an inmate's competence to proceed to execution. The standard used simply does not contemplate the use or necessity of treatment to maintain competence to proceed to execution.

Since La. R.S. 15:830.1 is inapplicable to this proceeding, the trial court's ordering treatment without following the exact requirements of the statute, such as the filing of a petition stating the reasons for treatment, did not violate due process. Though inapplicable, the statute is valuable, as utilized by the trial court, as a measuring stick of what procedure due process requires in treating a death row inmate whose competence is maintained through medication.

La. R.S. 15:830.1 authorizes the court to treat an inmate if pursuant to a contradictory hearing, the court determines that treatment is necessary to prevent harm or injury to the inmate or others. This means that the court, after determining the inmate's incompetence by the applicable standard, is required to order treatment if it is necessary to maintain or achieve the inmate's competence. The statute does not provide for a second hearing. A determination that without medication the inmate may cause harm to himself or others (i.e., incompetent) necessitates that the court order treatment and that the inmate submit to treatment. The statute requires an adversarial hearing on the question of competence. Perry received such an adversarial hearing in regard to the question of competence.

This same line of reasoning applies regarding the inapplicability of La. C.Cr.P. art. 648 to this proceeding. Petitioner argued that in the alternative to La. R.S. 15:830.1, La. C.Cr.P. art. 648 was the mandatory provision for determining whether a death row inmate could be treated so as to achieve or maintain competence. Yet, as with La. R.S. 15:830.1, there are numerous reasons arguing against the applicability of art. 648 to this proceeding.

The first of these reasons is that the language employed shows a clear legislative intent that the provision was enacted to deal solely with pre-trial capacity determinations. The language used in art. 648 speaks of "defendants," "charges," "outpatient care and release," and "proceeding with trial." Nowhere does the article recognize its application to death row inmates in proceedings determining the inmate's competence to proceed to execution.

The second reason is that the article, as did La. R.S. 15:830.1, employs unworkable standards for determining if treatment is necessary so as to maintain a death row inmate's

competence to proceed to execution. The article provides for the treatment of individuals incapable of standing trial, being released without being a danger to himself or others, or unlikely in the future to be capable of standing trial. No matter what verbal gymnastics one attempts, it is impossible to fit a death row inmate, sentenced to die for murdering five persons, into any of these pigeonholes.

Third, Hanson, supra, does not stand for the proposition that art. 648 regulates the treatment of a death row inmate so that his competence to proceed to execution may be maintained. Perry latches on to dicta in Hanson stating that "the issue of ... mental incapacity to proceed may be raised at any stage of the proceedings, even after conviction," Hanson, at 1173, for the proposition that art. 648 must regulate treatment of Perry.

This notion must be rejected, however, because Hanson simply did not contemplate the application of art. 648 to a proceeding encompassing issues involving a death row inmate's competence to proceed to execution. The facts in Hanson bear this out. The defendant in Hanson had been convicted, yet when he raised the issue of incompetence, he had not yet been sentenced and there had been no determination of any post-trial motions, such as a motion for a new trial. In a practical sense, the prosecution had not yet ceased.

In petitioner's case, he is clearly beyond the stage in the criminal proceeding that the defendant in Hanson was when he raised the issue of his incompetence. Perry has been tried, convicted, and sentenced to death for murdering five persons and his sentences and convictions have been upheld through the highest court in the land.

Yet Perry asserts that his position is the same as the defendant's in Hanson; therefore, he cites dicta in support of his belief that Hanson is controlling in this proceeding. The distinctly different facts, and common sense, dictate otherwise; that is, that the court in Hanson simply did not contemplate the application of art. 648 in this stage of a criminal proceeding.

Finally, in his plurality opinion in Ford, Justice Marshall failed to recognize art. 648 (or La. R.S. 15:830.1) as procedures for the regulation of treating death row inmates for

achieving or maintaining competence in his review of state law. Justice Marshall recognized seven states which have statutory procedures providing for the suspension of sentence and the transfer of the inmate to mental facilities. Ford, at 2602, footnote 2. Louisiana was not listed among these states.

Yet like La. R.S. 15:830.1, art. 648 can be a useful analogy of the type of procedure required by due process in this proceeding. There must first be a hearing, before a detached magistrate, on the question of the inmate's competence to proceed. Once it is determined that the inmate is incompetent (or is competent only when treated) the court necessarily must order treatment, even without consent. Implicit in this adjudication of incompetence (or competence maintained through treatment) is the inmate's submission to treatment.

The questions of competence and treatment are inextricably intertwined. It is not only impractical, it is unworkable for a court to render a determination that an inmate is incompetent (or is competent only while treated) yet be without authority to render a determination ordering treatment.

It is untenable to think a court, upon determining incompetence (or competence maintained only through treatment) cannot order treatment, but must initiate a second, separate proceeding to determine if it can treat the inmate. Neither state nor federal law require such an absurd result.

Accordingly, the State asserts that the procedure of ordering treatment upon a determination of incompetence satisfies due process. A proceeding determining competence necessarily subsumes a determination on the necessity of treatment. The trial court did not offend due process by ordering treatment upon its determination that Michael Owen Perry is incompetent (or competent only when treated).

G. The trial court's ordering treatment of Michael Owen Perry comports with the Eighth Amendment and La. Const. Art. 1, §20.

The Eighth Amendment to the United States Constitution prohibits the imposition of "cruel and unusual" punishment. La. Const. art. 1, §20 prohibits any person from being subjected to "cruel, excessive, or unusual" punishment.

The United States Supreme Court and the Louisiana Supreme Court have held that the imposition of the death penalty for the crime of first-degree murder is not violative of either the federal or state constitutions as "cruel and unusual" punishment or as "cruel, excessive, or unusual" punishment. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); State v. Myles, 389 So.2d 12 (La. 1980). Absent some other imposition of punishment, a condemned inmate's execution based on medically maintained competence does not violate the Eighth Amendment or La. Const. art. 1, §20.

Since competence maintained by treatment is valid to proceed to execution, it is clear that no constitutional violation exists by executing Perry based on this competence. Therefore, for an Eighth Amendment violation to occur in this situation, there must necessarily exist some other evidence of a punishment outside of simply being executed based on medically maintained competence.

Yet what does the evidence show? It shows that the court's order of treatment is not a constitutional violation; rather, it is the fulfillment of the State's obligation to treat the medical needs of inmates. The evidence shows that the treatment ordered is the standard form of treatment for this illness, and is the treatment prescribed by the doctors.

The evidence also shows that the treatment ordered is beneficial to Perry. Perry himself admits to its beneficial aspects in making him feel better. (R. p. 0564) The evidence further shows the existence of no side effects. (R. p. 0746).

Finally, the evidence shows it was not the court's ordering treatment that violated the Eighth Amendment. If any constitutional violation occurred, it occurred through the removal of Perry from treatment, thereby "sentencing" him to a life of insanity, a punishment clearly prohibited under both the Eighth Amendment and La. Const. art. 1, §20.

Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) recognized the State's duty and obligation to provide medical care for inmates under the Eighth Amendment. The court stated that the "deliberate indifference to serious medical needs of prisoners constitute the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." Gamble, at 291.

After a judicial determination that Perry requires treatment to maintain competence, to refuse the court the authority to order treatment of a mentally deteriorating inmate would surely constitute deliberate indifference to the prisoner's medical needs. If Perry were not on death row, would he contend the State was not obligated to provide treatment for his mental illness? The trial court's order of treatment, even without Perry's consent, constitutes a judicial decision prohibiting "deliberate indifference" to Perry's medical needs, thereby ceasing the unnecessary and wanton infliction of a "life" of insane incarceration.

The court ordered treatment comports with the Eighth Amendment by refusing to allow the inmate's mental condition to deteriorate, thereby sentencing Perry to an unjustifiable punishment of a life of madness. As the Supreme Court stated in Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2393, 69 L.Ed.2d 59 (1981), the Eighth Amendment prohibits the unnecessary and wanton inflictions of pain that are "totally without penological justification." Rhodes, at 2399.

A sentence of death for the crime of first-degree murder has been approved by the people of this state. Yet no law exists holding that a life of insane incarceration for the commission of a crime serves a penological or societal justification. Therefore, the court's order requiring treatment is not a violation of the Eighth Amendment or La. Const. art. 1, §20; rather, it is the fulfillment of an obligation required by those provisions to prohibit the sentencing of an individual to a life of insane incarceration.

The trial court's ordering treatment for Perry is not violative of the Eighth Amendment or La. Const. art. 1, §20, because treating Perry would alleviate his illness and maintain his competence. Can Perry honestly claim that treatment which stabilizes his competence is cruel or unusual punishment?

It is clear that the treatment prescribed by Perry's physicians does not constitute cruel or unusual punishment. What the evidence does show is that the medication prescribed and ordered for Perry is not punishment; rather, the prescribed treatment is an acceptable and recommended mode of treating individuals suffering from schizoaffective disorder.

The evidence and testimony presented by the doctors who have participated in the previous treatment of Perry clearly supports this contention. It is also clear from the evidence and testimony that this belief is consistent throughout: medication is not only the recommended form of treatment, it is clearly beneficial to Perry's mental state.

Dr. Jimenez, who treated Perry during his confinement at Feliciana Forensic Institute, testified as to the direct correlation between treatment, Perry's competence, and the medication's benefits to his mental condition. In response to questions from the court and petitioner's counsel at the October 21st hearing, Dr. Jimenez's testimony was consistent throughout. That is, treatment maintains Perry's competence and alleviates the symptoms of Perry's illness.

In response to questions by the trial court, Dr. Jimenez stated:

[By the court]:

- Q. Now, were you aware of the fact that he had had an injection of, ah, what I'll call, ah, the long-term, long-affecting Haldol on September 3rd?
- A. Yes, sir, I did. He received Haldol Decanoate 2 CC IM September the 3rd, 1988. He had been sporadically taking his medication. Apparently, after that, the Haldol by mouth, but three days before I saw him he had completely refused to take his medication by mouth.
- Q. Now, my notes indicate that he was given oral short-term Haldol on September 11th, which would have been two days before your September 13th examination, do your notes reflect that?
- A. What I have, sir, is the Haldol ten milligrams, refusing very often, took once in three days; that would be pretty close, what you have.
- Q. And at the time that you saw him on September 13th, was he psychotic?
- A. No, sir. He was pretty stable, based on my examination and evaluation.
- Q. All right. Let's move on to September 26th, did your examination take place in the same area of the prison?
- A. Yes, sir. The same place, and I asked him the same questions, and he told me that I've asked those questions several other times in the past. And, again, I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him, and he was able to do so.

Q. Was he psychotic on September 26th, in your opinion?

A. No, sir, he was not.

Q. And at that time, his last medication injection would still have been September 3rd, is that correct?

A. That's right, sir.

(R. at 0753-4) (Emphasis supplied).

In response to questions posed by petitioner's counsel regarding treatment, Dr. Jimenez stated:

-(By Mr. Nordyke):

Q. Yes, sir. Just a few. Doctor, on the 26th when you saw him, the effects of the Haldol-D was still present in Michael's system, weren't they?

A. Yes, sir.

Q. In fact, Haldol-D is a long-lasting psychotropic?

A. That's true, sir. The effect usually last from three-to-four weeks.

Q. So the fact that he was not psychotic when you saw him on the 26th shouldn't surprise you at all considering the Haldol, did it?

A. That's true, sir.

(R. at 0755) (Emphasis supplied).

It is clear that Dr. Jimenez believes medication is not only appropriate, but effective in treating Perry's condition.

This testimony is consistent with that previously given at and in connection with the April 20th hearing. In a report of March 10, 1988, Dr. Jimenez wrote that, "Mr. Perry will become competent with the proper medication adjustment." (R. at 0025). This belief was corroborated by the doctor's testimony at the April hearing.

[By the court]:

Q. Review your report and then answer the question.

A. I indicated ... that I feel that Mr. Perry will become competent with the proper medication adjustment.

(R. at 0510-1).

This testimony of Dr. Jimenez regarding the correlation between treatment and Perry's competence is

consistent with the testimony of Dr. Cox. In response to questions by the court at the September 30th hearing, Dr. Cox stated:

[By the court]:

Q. The last time you were in this court, Dr. Cox, your testimony was that he does respond to medication when he is on it.

A. Yes, sir.

Q. Your opinion is still the same on that?

A. Yes, sir.

Q. You also said that -- of course, my ultimate decision will be what does competent mean -- but your testimony at the previous hearing was, when he's on medication he's competent and when he's not on medication he's not competent. Is that still your opinion?

A. That's basically it, sir.

Q. Let me ask you some question to maybe educate me a little bit in this area. This Haldol that's being or has been given by way of injection and by use of some type of oral medication, this is what's called an anti-psychotic drug, is that correct?

A. Yes, sir, that's correct.

Q. Are there any other type of lesser controversial drugs, such as, tranquilizers or sedatives that would enhance or assist Mr. Perry in maintaining competency?

A. No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs. That's a specific class in pharmacology.

(R. p. 9745).

It is clear that Dr. Cox advocates treatment for Perry not only to maintain petitioner's competence, but because his condition responds favorably to treatment. It is also clear that Dr. Cox advocates the continued treatment of Perry with the class of medication ordered by the trial court.

This belief is consistent with Dr. Cox's opinions expressed pursuant to the April 20th hearing. In a report dated April 20th, Dr. Cox stated:

"On neuroleptic medication, he has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence.

It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed. (Report of Dr. Cox dated April 20, 1988).

Dr. Cox's testimony, in response to questions posed by the court, the State, and petitioner's counsel, corroborated his opinions expressed in the report.

[By the court]:

Q. I understand that. But my question is do you agree with their ...

A. That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q. And does Haldol affect him beneficially?

A. Yes, sir, when he takes it in adequate doses it affects him beneficially.
(R. p. 0554-5).

Dr. Cox went on to state later in his testimony in response to the court's questioning that:

[By the court]:

Q. ...based on your examination of him on March 3rd, 1988 when he was on Haldol, at that point in time, in your opinion, was he sane or insane?

A. At that point in time, in my opinion, he was able to distinguish right from wrong.

Q. Also, on that date in question when he was on Haldol did he have the capacity to know of the fact of his impending execution?

A. Yes, sir, I went into that with him that day specifically as I do most of the time when I see him. He was aware of where he was, he was aware that he was under a sentence of death. He was aware that he could be killed by the electrocution, and he was aware of why he was there.

Q. That was my next question. Did he understand the reason for the death penalty...

A. Yes, sir.

Q. ...being imposed?

A. He did, though at that time he denied his guilt to me for the crime. And he knew why he was there.

(R. p. 0566).

In response to questions posed by the State regarding the beneficial aspects of treatment, Dr. Cox not only expressed his opinion that treatment alleviated Perry's illness, he reported Perry's own beliefs that treatment made him (Perry) feel better:

[By Mr. Salomon]:

Q. Have you ever utilized any specific tests in order to confront the question of malingering while medicated?

A. I don't know of any specific tests that exist. When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's a change in his function.

(R. p. 0564).

In an attempt by petitioner's counsel to impeach or rebut the doctor's previously expressed views, Dr. Cox emphatically reiterated the direct correlation between treatment and competence:

[By Mr. Nordyke]:

Q. And even after the forced treatment and massive doses of Haldol and he's still sometimes floridly psychotic?

A. He gets better. In my mind I think I settled the issue, in fact, I know I settled the issue. He does respond to medication when he's given it and he gets better.

(R. p. 0557; emphasis supplied).

Finally, Dr. Kovac, the administrator of the hospital at Angola, rendered her opinion on the benefits Perry receives from treatment:

[By Mr. Nordyke]:

Q. And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A. It depends on -- just in my limited experience with Michael, it depends on whether he had taken his medication.

Q. But it does vary from day to day?

A. Well, just using this example -- this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q. That's because you gave him -- that's because he was given a shot of Haldol-D on September 3rd?

A. That's correct, because he had his medication.

(R. p. 0724).

What conclusion can be gleaned from this testimony? Simply that treatment not only maintains Perry's competence to proceed to execution, but that medication is an acceptable, recommended, and beneficial course of action in treating Michael Owen Perry's mental condition.

Finally, petitioner argues that treatment violates the Eighth Amendment and La. Const. art. 1, §20 because of the potential for side effects. Yet an examination of the evidence clearly refutes any notion that Perry suffers any of the alleged severe side effects as a result of the medication.

In his testimony of September 30th, Dr. Cox stated he had not seen Mr. Perry suffer any side effects whatsoever.

[By the court]:

Q. Have you seen any side effects of Mr. Perry...

A. I have not seen...

Q. ...in that way?

A. I have never seen Mr. Perry have side effects.

(R. p. 0746; emphasis supplied).

This testimony simply reiterated Dr. Cox's previous statements regarding the fact that Perry does not suffer any side effects from the treatment:

[By Mr. Salomon]:

A. Do I think he has tardive dyskinesia now?

Q. Yes.

A. No, I do not think he has it now.

Q. What would it take for him to become a member of that class disfunction?

A. There is a hazard if he continues taking these medications indefinitely, say for the next five years or so, that he's got a twenty to twenty-five percent risk of developing this complication.

(R. pp. 0574-5; emphasis supplied).

Dr. Cox clearly believes that Perry does not suffer from tardive dyskinesia, or any other side effect due to his undergoing treatment. Dr. Cox also discounts the possibility of any side effect ever manifesting itself because of medication as slight, and possible only after an extended period of treatment.

In fact, not only does Perry not suffer from any serious side effects as the result of medication, he has been diagnosed as exaggerating some of the lesser side effects recognized as possible from use of the treatment. Dr. Jimenez testified that Perry has on occasion exaggerated some side effects:

[By Mr. Salomon]:

Q. All right. Now you mention that he exaggerated what, his symptoms?

A. Yes, sir.

Q. And can you explain to me how would he exaggerate those symptoms?

A. He would -- at times he would be able to move and at times he would not move at all. And, in fact, there was a time there when he would stay just in bed because he claimed he couldn't move.

(R. pp. 0528-9).

Though some question exists as to whether Perry suffers some minor symptoms of the less severe side effects of treatment (outside of his diagnosed exaggeration) these simply do not amount to an Eighth Amendment violation for two reasons. The first is the substantial benefits of treatment, documented and previously discussed. Second, is that these symptoms can be effectively controlled by medication.

Extra Pyramidal Syndrome (EPS) is a potential lesser side effect of Haldol treatment. Though dispute exists as to whether Perry has actually ever suffered EPS symptoms, whether he has or has not does not negate the fact that this potential side effect, and its attendant symptoms, can be effectively controlled by medication.

EPS side effects from anti-psychotic medications can be effectively treated by medication. Benadryl, Akineton, Artane, Parbodel, and Parsidol are all recognized as effective treatment for drug induced EPS symptoms. In addition,

Symmetiel is recognized as an effective treatment specifically created and intended as treatment for drug induced EPS reactions. (Physician's Desk Reference, 43 Ed., 1989). Should Perry ever develop EPS symptoms, these symptoms can be alleviated with no adverse effects, with the proper medication.

Outside of the potential for side effects, petitioner's counsel claims the administration of antipsychotic medication, specifically Haldol, violates the Eighth Amendment and La. Const. art. 1, Section 20 because of his equating this medication with a frontal lobotomy. Petitioner's counsel makes the broad claim that the same drastic effects resulting from a frontal lobotomy are those that result from Haldol treatment. This assertion must be dismissed as folly, in light of the doctors' testimony regarding Haldol treatment and its everyday use by one special, talented young man.

For those unfamiliar with the Louisiana sports scene, Chris Jackson is a freshman basketball player at Louisiana State University. An All-American, Jackson has been hailed as the second coming of a former basketball star, Pete Maravich. Yet in a recent national publication, it was revealed that Chris Jackson suffers a neurochemical disorder known as Tourette syndrome, which manifests itself in uncontrollable moans, arm and hand-flapping and spasmodic twitching and blinking. However, this disorder has been effectively brought under control by Chris Jackson's everyday use of a specific medication: Haldol. "Can't Hold This Tiger," Sports Illustrated, February 20, 1989, pp 48-51. (Emphasis supplied).

Surely even petitioner's counsel must hesitate in claiming that an individual who has suffered the drastic effects of a frontal lobotomy could perform in any arena with the skill, courage, and acumen Chris Jackson performs with on a basketball court. Petitioner's unfounded claim that Haldol treatment equates with a frontal lobotomy must fall under the weight of its own pretense.

Petitioner's counsel vociferously espouses claim after claim in an attempt to prove that treatment of Perry constitutes a violation of the Eighth Amendment or La. Const. art. 1, Section 20. Ultimately, if any violation of either constitutional provision has occurred, it has been at the hand of Perry's own counsel.

Mr. Nordyke's actions in ordering Perry removed from treatment of Haldol prior to the sanity hearings may have created an enormous opportunity for tardive dyskinesia, the most serious potential side effect of Haldol treatment, to appear. Product information available to date in regard to Haldol pertinently states in part:

"Withdrawal Emergent Neurological Signs - Generally, patients receiving short term therapy experience no problems with abrupt discontinuation of antipsychotic drugs. However, some patients on maintenance treatment experience transient dyskinetic signs after abrupt withdrawal. In certain of these cases the dyskinetic movements are indistinguishable from 'Tardive Dyskinesia' except for duration. It is not known whether gradual withdrawal of antipsychotic drugs will reduce the rate of occurrence of withdrawal emergent neurological signs, but until further evidence becomes available, it seems reasonable to gradually withdraw use of Haldol." Physician's Desk Reference, 42nd Ed., 1988, at p. 1239.

Without regard for medical opinion, counsel for petitioner abruptly removed petitioner from Haldol treatment in an apparent attempt to manipulate the criminal justice system. In so doing, counsel for petitioner subjected Perry to the potential for the same adverse effects he claims that the state imposes on Perry in treating petitioner with Haldol.

Yet an even greater injustice in these actions is the attempt at festering and promoting insanity in Michael Owen Perry. As an officer of the court, counsel for petitioner arbitrarily assumed the role of judge and jury, and rendered a judgment sentencing Perry to a life of insane incarceration by removing him from medication that was clearly beneficial to his mental condition. In so doing, counsel for petitioner sentenced his client to a punishment with absolutely no penological and, more importantly, no societal justification.

For these reasons, the State asserts that the trial court's order of treatment is valid under both the Eighth Amendment and La. Const. art. 1, Section 20.

H. The trial court's ordering treatment of Michael Owen Perry comports with the exercise of petitioner's personal rights.

The State asserts that once a death row inmate raises the issue of incompetence, and it is determined that the inmate is incompetent, or is competent only if maintained on treatment, the inmate must submit to treatment. The inherent nature of a competency proceeding requires that once an inmate questions his competence to proceed, is provided the requisite procedural protections in reaching a determination on that issue, and is adjudicated incompetent (or in need of treatment) by a detached judicial officer, the court is required to order treatment.

Yet if it is determined that these questions are not inextricably intertwined, requiring submission to treatment upon a determination of its necessity, the State further asserts that the trial court's order is valid and not violative of any right Perry may have in refusing treatment. The reason being that the State's legitimate interests in retribution, finality of sentence and providing medical assistance to mentally ill prisoners in its custody overrides any interest Perry has in refusing treatment.

Petitioner asserts a right to be inviolate from forcible medication. Yet forcible treatment of individuals pursuant to legitimate state interests has a long history in our constitutional framework.

In Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) the Supreme Court was faced with a question of whether an individual had a right to refuse a state required vaccination. In rejecting the individual's right to refuse the treatment, the court stated:

"The defendant insists that (treatment is) ... hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best, and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. ... Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." Jacobson, 25 S.Ct. at 361.

As far back as the turn of the century, the right to refuse forcible medication has been held to yield to legitimate state interests. This principle is even more persuasive when involving a death row inmate's attempt to forestall his execution by refusing treatment that maintains his competence to proceed.

The State acknowledges that Perry has not forfeited all constitutional rights simply by reason of his conviction and incarceration. Yet the Supreme Court in Bell v. Wolfish, 441 U.S. 520, 49 S.Ct. 1861, 60 L.Ed.2d 447 (1979), recognized that:

"Simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights." Bell, at 1877.

The court has also applied this rationale to the restriction of inmate's fundamental rights, stating that these are also "subject to substantial restriction as a result of incarceration." Turner v. Safley, 107 S.Ct. 2254, at 2556 (1987).

The State does not seek to medicate Perry based solely on his incarceration. Yet the fact of his conviction and incarceration for the murder of five persons necessarily gives great credence to the legitimacy of the State's interest in retribution.

Retribution has been held to constitute a legitimate state interest in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In holding that retribution and deterrence of capital crimes were legitimate state interests in validating the death penalty, the court stated that retribution is not a "forbidden objective nor one inconsistent with our respect for the dignity of men." Gregg, at 2930.

This holding was reaffirmed by the court in Atiyeh v. Capps, 449 U.S. 1312, 101 S.Ct. 829, 66 L.Ed.2d 785 (1981). In reiterating its views expressed earlier determining that retribution constituted a legitimate state interest, the court stated:

"There is nothing in the Constitution that says that rehabilitation is the sole permissible goal

of incarceration, and we have only recently stated that retribution is equally permissible." Atiyeh, at 830.

It is clear that the State's legitimate interest in retribution must necessarily override Perry's right to refuse treatment. The State's interest in retribution for the murders of five of its citizens cannot be forestalled by a death row inmate's attempts to subvert the criminal justice system by refusing treatment.

The State's interests in retribution and the execution of validly imposed sentences were also recognized as legitimate by Justices Powell and O'Connor in Ford. Justice Powell forcefully asserted these interests in stating:

"... the Eighth Amendment claim at issue can arise only after the prisoner has been validly convicted of a capital crime and sentenced to death. Thus, in this case the State has a substantial and legitimate interest in taking petitioner's life as punishment for his crime. That interest is not called into question by petitioner's claim. Rather, the only question is not whether, but when, his execution may take place. This question is important, but it is not comparable to the antecedent question of whether petitioner should be executed at all." Ford, at 2610.

Justice Powell reiterated this view, that the State's legitimate interest in retribution supersedes an inmate's right to refuse treatment that maintains his competence to proceed to execution, in stating:

"I consider it self evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, at 2612. O'Connor, J., concurring in the result in part and dissenting in part.

A common thread runs throughout these decisions; that is, retribution is a legitimate state interest. Having been determined to be a legitimate state interest, it is apparent that this right of retribution must necessarily override a death row inmate's attempts to subvert his validly imposed sentence of death by refusing treatment that maintains his competence.

The State, and society, clearly have valid, legitimate interests in carrying out its constitutionally established

interest in retribution. The State, and society, have a constitutionally legitimate interest in executing an inmate lawfully convicted and sentenced for the murder of five of its citizens. Having established this right and interest in retribution, any right Perry has in refusing treatment must fall.

As previously set forth, the State has a constitutionally mandated duty to provide medical care for inmates under the Eighth Amendment. See Estelle v. Gamble, supra. The State clearly has an interest in providing treatment for an individual in its custody who suffers from mental illness. To deny the State the ability or opportunity to treat a mentally ill inmate would force the State to violate its duty, under the Eighth Amendment, of providing medical care to those in its custody who require treatment.

Finally, petitioner's counsel argues that forcible treatment violates Perry's First Amendment rights to free speech and thought. A review of the beneficial aspects of treatment regarding Perry's mental state points to the contrary.

A lengthy, yet relevant, excerpt from the testimony of Dr. Cox at the April 20th hearing bears this out:

[By Mr. Salomon]:

- Q. Okay. And what illness is the specific case Mr. Perry endures?
- A. He's being given this drug because he has a diagnosis of Schizoaffective Disorder.
- Q. And this neuroleptic drugs will suppress what particular symptoms of Schizoaffective Disorder?
- A. Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make his less labile and agitated.
- Q. Okay, so you told me he would become passive, it will reduce his delusions...
- A. Not passive, but he will...
- Q. Less hostile?
- A. Less hostile, less aggressive, less bouncing around off the wall.
- Q. All right, so, what else do we have besides less hostile, and no delusions or reducing...

A. Thinking more coherently, and more in contact with his environment.
Q. More coherently means what?

A. Well, more coherent means that he could sit down and give me--I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for example, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, to something else that is completely unrelated.

The testimony of Dr. Cox shows that the treatment alleviates the symptoms of Perry's mental illness. Rather than clouding Perry's ability to think clearly, the treatment actually allows Perry to think and communicate in a rational, coherent manner. Instead of infringing on these First Amendment rights, the treatment actually enhances Perry's ability to exercise these rights; therefore, treatment cannot be deemed to violate either the right to free speech or thought guaranteed by the First Amendment.

For these reasons, the State asserts that its interests in retribution, executing valid sentences, and providing care for persons in its custody supercedes any interest Perry may be deemed to possess in refusing treatment. Wherefore, the trial court's determination of competency to be executed and order of continued treatment should be affirmed.

XI. THE TRIAL COURT'S CONDUCT OF THESE PROCEEDINGS SURPASSED CONSTITUTIONAL REQUIREMENTS

The inmate now contends that the hearing afforded to him was inadequate to ensure against the arbitrary deprivation of his right not to be executed while insane (incompetent). He asserts an amalgam of claimed errors. The claims range from broad challenges of the entire proceeding to assertions that specific matters were erroneously utilized by the trial court. For the most part, the claims are conclusory with little or no discussion of what Louisiana's procedures accompanying the inquiry into competency to be executed should be.

The State prefers to first ask what does the U.S. Supreme Court require in Ford v. Wainwright, supra; second, what procedure has the inmate been afforded in the present inquiry into his competency to be executed; third, what has Louisiana mandated as the procedure to accompany the inquiry into competency to be executed; fourth, what are the alleged specific errors committed by the trial court; and fifth, do the alleged errors amount to a denial of basic fairness.

The State respectfully submits that a thoughtful and thorough analysis of what in fact transpired herein will conclusively demonstrate that the trial court's conduct of these proceedings surpassed constitutional requirements.

A. Ford v. Wainwright establishes guideposts in determining the procedures which must accompany the inquiry into competency to be executed.

As now Chief Justice Rehnquist pertinently stated in Ford:

"Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity." Ford, 106 S.Ct. at 2615, (Rehnquist, J., dissenting).

The state of Florida's procedures accompanying the inquiry into sanity were genuinely at dispute in Ford v. Wainwright. Florida procedures basically amounted to the Governor appointing a panel of three psychiatrists to evaluate whether, under Florida Statute §922.07(2)(1985), the inmate had the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him. The

commission was required to report its findings to the Governor who had the final decision on whether the inmate was competent and whether a death warrant should issue.

The Court in Ford garnered a majority with regard to Justice Marshall's parts I and II. In parts I and II, five Justices (Marshall, Brennan, Blackmun, Stevens and Powell) agreed that the Eighth Amendment established a substantive prohibition against the execution of the insane. Further, these same five Justices concurred that the federal district court was obliged to hear Ford's claim on collateral review because the Florida statutory procedure was inadequate to receive a presumption of correctness according to 28 U.S.C. §2254(d).

The divergence of opinion within the court is apparent on the question of what procedure must accompany the inquiry into sanity. The dilution of Justice Marshall's majority occurs with the concurring opinion of Justice Powell. The split revolves around the necessity of a "full-scale sanity trial," according to Powell's interpretation of Marshall's opinion. Marshall did not, in fact, refer to a "full-scale sanity trial." What Marshall actually stated was: "[w]e do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests...." Justice Powell may have erroneously expanded on Marshall's concept of what procedure is necessary to enforce the Eighth Amendment right not to be executed while insane. Ford, supra, at 2610.

Justices Powell and Marshall also differ on what the "opportunity to be heard" standard entails. Further, Justices O'Connor and White have additional, but different, views of what procedural due process requires in the context of determining competency to be executed. Specifically, O'Connor and White suggest that an "opportunity to be heard" would not invariably require oral advocacy or even cross-examination. Ford, 106 S.Ct. at 2613.

Justice Marshall concluded that the Florida procedures for determining competency to be executed were inadequate to preclude federal determination of the constitutional issue. He identified the Florida deficiencies as:

1. Failure to include the prisoner in the truth-seeking process. He found this failure to be premised upon the fundamental requisite of due process of law embodied within the concept of an "opportunity to be heard." Marshall found this failure to be

particularly repugnant in view of the fact that "state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution." Ford, 106 S.Ct. at 2604. Further, the Governor had an announced policy of not considering any evidence which the prisoner might submit.

2. "A related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrist's opinions." Ford, 106 S.Ct. at 2605. Such denial of ability to "challenge the state expert's opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted." Id.

3. Finally, Marshall opined: "Perhaps the most striking defect in the procedures... is the State's placement of the decision wholly within the executive branch." Id. This "most striking defect" is premised upon the recognition that no constitutional right has ever been entrusted to the unreviewable discretion of an administrative tribunal.

Justice Powell also examined the Florida procedures for determining an inmate's competency to be executed. The examination likewise addressed whether Florida's procedures comported with the requirements of procedural due process. Powell, like Marshall, concluded that:

"[T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process." Ford, 106 S.Ct. at 2610.

Justice Powell's conclusion that Florida's procedure failed to comport with due process is premised upon a somewhat different foundation than that of Justice Marshall. Powell pertinently states:

"[I]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'" Ford, 106 S.Ct. at 2609-10.

Powell believes that this opportunity was denied in Ford's case since "[t]he Florida statute does not require the Governor to consider materials submitted by the prisoner, and the present Governor has a 'publicly announced policy of excluding' such materials from his consideration." Ford, 106 S.Ct. at 2610.

In essence, Powell would require the State's procedures to include "an impartial officer or board that can

receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination." Ford, 106 S.Ct. at 2611. This view differs from Marshall's purported "full-scale sanity trial" which is akin to procedures commensurate with post-arraignment adversarial capital proceedings. Powell has chosen to distinguish his suggested standard on the basis that due process "require[s] only 'such procedural protections as the particular situation demands.'" Ford, 106 S.Ct. at 2610. (Quoting from Matthews v. Eldridge, 96 S.Ct. 893, 902).

The State herein suggests, as does Justice Powell, that "a number of considerations support the conclusion that the requirements of due process are not as elaborate as Justice Marshall suggests." Ford, 106 S.Ct. at 2610. First, the heightened procedural requirements on capital trials of guilt and sentencing do not apply in this context since the question of when an execution shall occur pale in view of the question of whether an execution shall occur. Second, the claim of incompetency is asserted in view of several claims prior to trial, which were adjudicated in favor of competency. Thus, the State can presume that the inmate remains sane at the time the sentence is to be executed. Third, the issues in this matter (of judging competency to be executed) are dissimilar to either trial or sentencing. This is a question for experts which is fraught with subtleties and nuances. Therefore, ordinary adversarial proceedings "are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." Ford, 106 S.Ct. at 2611. Quoting Powell "[a]s long as basic fairness is observed, I would find due process satisfied." Id.

Justice O'Connor, with Justice White joining, wrote separately to express her views on the requirements imposed upon the states by the due process clause. She basically concluded that the "demands are minimal in this context." Ford, 106 S.Ct. at p. 2612. Justice O'Connor viewed due process as requiring that the decisionmaker afford the condemned an "opportunity to be heard" before deciding whether he possesses the capacity to be executed. Id. O'Connor goes on to state:

"While I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions." Ford, 106 S.Ct. at 2613.

O'Connor, like Marshall's plurality and Powell's concurrence, indicates her concern and dissatisfaction with the Florida Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane." Id.

As commentators have concluded, "[t]he procedure for rendering a final determination of competence, for purposes of execution, is a critical issue. The only majority consensus is that proper decision making authority is not solely executive." Note, Ford v. Wainwright: Warning - Sanity on Death Row May Be Hazardous To Your Health, 47 La. L.Rev. 1351, 1355 (1987). Consensus other than that hereinabove described is difficult, especially in light of the new court members Scalia and Kennedy.

The State of Louisiana, however, respectfully suggests that procedural due process satisfies basic fairness by providing the condemned with:

- (1) Inclusion of the prisoner in the truth seeking process (i.e., the "opportunity to be heard")(based on the expressions of seven justices, but for Rehnquist and Burger);
- (2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (Marshall's plurality);
- and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (Marshall's plurality and Powell's concurrence).

In view of the aforesaid criteria, the State of Louisiana respectfully submits that Perry was afforded procedural due process in excess of constitutional requirements.

B. The inmate was afforded basic fairness in the conduct of an inquiry into his competency to be executed.

Michael Owen Perry was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The most illustrative method is to detail in a

laundry list fashion the privileges afforded to the inmate by the trial court:

- (i) He was afforded the assistance of counsel;
- (ii) He was afforded compulsory process;
- (iii) He was afforded the right to present evidence on his behalf;
- (iv) He was afforded the opportunity to choose half of the members of the sanity commission which evaluated him;
- (v) He was afforded the right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;
- (vi) He was afforded the privilege to participate in an adversarial hearing;
- (vii) He was afforded the privilege to testify as a witness and be videotaped for posterity;
- (viii) He was afforded the right to an independent and neutral decisionmaker outside of the executive branch of government;
- (ix) He was afforded the privilege of judicial review.

A comparison to the essence of Ford reveals that the inmate benefited from Judge Hymel's version of procedural due process. As stated above, the inmate is truly limited to (1) the opportunity to present evidence on his behalf; (2) the right to challenge and impeach the experts; and (3) the right to an independent decisionmaker.

(i) He was afforded the assistance of counsel.

The record reflects that the inmate has benefited from numerous appellate counsel. Since the day of his sentencing he was represented by Messrs. Arcenaux and Romero. (R. p.6). Arcenaux and Romero withdrew from the representation on January 14, 1988. They were immediately replaced by Judith Menadue, Michael Vitiello, Keith Nordyke and June Denlinger. (R. pp. 15-18, 323-324). Further, Joe Giarrusso was also enrolled as

counsel of record for the inmate. (R. pp.2, 63-67). Throughout the proceedings, Perry has been represented by multiple counsel. At this time he maintains Giarrusso, Nordyke and Denlinger.

As is apparent from each of the inmate's legal representatives, they have each volunteered their time and efforts on his behalf. There is presently little or no authority for the proposition that the Sixth Amendment right to counsel extends to a post-conviction setting. The sole debatable authority for the necessity of counsel is La. C.Cr.P. art. 930.7(B) wherein it provides that "[t]he court shall appoint counsel for an indigent petitioner when it orders an evidentiary hearing...."

The State suggests that the present proceeding is neither a pre-trial adversarial setting nor a post-conviction application setting which mandates the providing of counsel. Nonetheless, the State respectfully submits that the inmate has never lacked for legal representatives. Therefore, the inmate has been afforded a greater degree of procedural due process than that mandated by the Fourteenth Amendment.

(ii) He was afforded compulsory process.

Beginning on the date of his enrollment as legal counsel, Mr. Nordyke exercised his right to compulsory process. (R. p. 1). On January 14, 1988, he requested and received immediate authorization to compel New General Hospital of the Louisiana State Penitentiary to produce all of the inmate's medical records. The court even went so far as to specifically ask defense counsel if he wished to present any evidence.

Court: I understand. My question is: do you wish to present any evidence?

Nordyke: No.

Court: I want to give you the opportunity.

Nordyke: No, Your Honor. (R. p. 762).

Throughout the period of January 14, 1988, to October 21, 1988, the inmate was permitted the opportunity to compel witnesses and documents in support of his cause. He chose to avail himself on some occasions and declined to do so on others. Nonetheless, the State respectfully submits that the inmate has never been denied the right to compulsory process.

(iii) He was afforded the right to present evidence on his behalf.

The inmate compelled the production of hundreds of pages of medical records from New General Hospital at Louisiana State Penitentiary. Every record he sought was introduced into evidence for the court's edification. (R. pp. 43-50, 85). At no juncture of this proceeding has the inmate asserted that he was denied the unfettered opportunity to present evidence in support of his contention that he has become insane subsequent to his conviction and sentence to death. As iterated above, defense counsel was given opportunities to present beneficial evidence. (Also see R. pp. 688 and 747).

(iv) He was afforded the opportunity to choose half of the members of the sanity commission impaneled to evaluate Perry's competency to be executed.

The minutes of court reflect that the trial court gave the inmate the ability to choose his own experts at state expense. (R. pp. 1-2, 19-20). This privilege certainly encompasses and supersedes Ford's suggestion that the inmate should be able to present evidence of an expert psychiatric nature different than the State's. Without a doubt, Perry has been afforded an opportunity not mandated by the procedural due process required in Ford. Therefore, the State respectfully submits that Perry has been afforded due process of law.

(v) He was afforded the right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed.

Four experts rendered opinions on the inmate's competency to be executed at the April 20, 1988 hearing. (R. pp. 496-695). Each of these experts was tendered to the inmate for cross-examination and recross. The inmate examined each expert on his written report, interview with the inmate, judgment on diagnosis and treatment, as well as the inmate's medical history and mental health at Angola's death row since December 20, 1985.

Two experts rendered opinions on the inmate's competency to be executed at the September 30, 1988 hearing. (R. pp. 706-748). Each of these experts was tendered to the inmate for cross-examination and recross. He availed himself of this opportunity also. Once again, the inmate thoroughly

examined each expert on the facts underlying their expert opinions that Perry was competent to be executed.

On October 21, 1988, Dr. Jimenez appeared to render an expert opinion on Perry's competence to be executed. (R. pp. 749-797). Dr. Jimenez was subjected to cross-examination on her opinion that Perry understood the nature of the death penalty and why it was being imposed upon him. The inmate was denied no opportunity to fully explore her expert conclusions on his competency to be executed.

The State respectfully submits that the inmate was afforded his procedural due process guarantee of the opportunity to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed.

(vi) He was afforded the privilege to participate in an adversarial hearing.

Unlike the suggestion of Justice O'Connor (that oral advocacy and cross-examination need not be required, Ford, 106 S.Ct. at 2613), Judge Hymel permitted the inmate to fully participate in all aspects of the proceedings. Each hearing was conducted in the format of a contradictory hearing. The rules of evidence were understandably lax, especially in view of the fact that the trier of fact was the trial judge and the fact that expert opinions on a res nova issue were being presented. As both Marshall and Powell suggest, the purpose of a procedure is to encourage accuracy in the factfinding determination. Ford, 106 S.Ct. at 2606, 2611. Moreover, "The competency determination depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'" Ford, supra, at 2611, (quoting from Addington v. Texas, 99 S.Ct., at 1811). In fact, Justice Powell pertinently states:

"This combination of factors means that ordinary adversarial procedures - complete with live testimony, cross-examination, and oral argument by counsel - are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity." Ford, 106 S.Ct. at 2611.

Indeed, even Justice Marshall basically agrees with the above assessment, as is reflected in the following passage:

"We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests...." Id. at 2606.

Although there is sufficient ammunition in Ford to argue that an adversarial hearing is not constitutionally required, the trial court afforded the inmate the privilege to participate in an adversarial hearing.

(vii) He was afforded the privilege to testify as a witness and be videotaped for posterity.

A corollary to the right to participate in an adversarial hearing was the inmate's right to testify. It is obvious that such a right is unusual since the inmate has great motives to advance spurious claims. As Justice O'Connor noted:

"Moreover, the potential for false claims and deliberate delay in this context is obviously enormous." Ford, 106 S.Ct. at 2612.

Also, now Chief Justice Rehnquist has recognized the patent folly in permitting the inmate to testify:

"[T]he requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity." Ford, 106 S.Ct. at 2615.

Nonetheless, the inmate's counsel called Perry to the witness stand as an "exhibit." (R. p. 6610). Such a stunt by inmate's counsel should be revealing of the manipulation being perpetrated by both the inmate and his attorneys.

Despite the tremendous potential for abuse, the trial court granted to Perry the right to testify. Furthermore, the trial court overruled the State's objection to the videotaping of this "event" or "show." (R. pp. 660-661). These privileges now exceed the de minimus protections afforded by procedural due process. The State respectfully submits that the inmate has benefited from rights greater than those guaranteed to him by the Fourteenth Amendment.

(viii) He was afforded the right to an independent and neutral decisionmaker outside of the executive branch of government.

In accord with the single consensus holding of Ford, 47 La. L.Rev. 1351, 1355 (1987), the State of Louisiana provided a district judge to preside over the hearing. The trial judge presided throughout the entire competency hearing. (R. pp. 1-5). The State therefore submits that the inmate has been guaranteed and afforded, his procedural due process rights according to Ford.

(ix) He was afforded the privilege of judicial review.

The trial court treated this matter as an appeal of a sentence. (R. pp. 793-795). Whether or not this matter is called an appeal or a writ application, the bottom line is that the inmate is given judicial review. Unlike the Florida procedure where Ford's decision stayed within the executive branch, Perry is given the benefit of appellate level review of the neutral decisionmaker's ruling. Therefore, the State respectfully submits that the inmate has been guaranteed, and afforded, procedural due process.

In summary, Louisiana has guaranteed, and provided, a vast array of rights, benefits and privileges to Perry. These guarantees exceed that which is required by the Ford court's view of procedural due process. The remaining question concerns whether Louisiana has guaranteed something which was not provided during the course of Perry's competency hearing. That is, does Louisiana require some procedure over and above the procedure mandated by Ford?

C. Louisiana has no statutory or jurisprudential expression on what procedures must accompany the inquiry into competency to be executed.

It is axiomatic that this cause deals with a third type of competency. The trial court recognized that there are three types of competency. (R. pp. 769-771).

Quoting from the trial court's opinion:

"First, there is 'insanity.' Article 14 of the Criminal Code provides that if the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from the criminal responsibility. This statutory mental incapacity originated from English common-law and jurisprudence; namely, the McNaughten (sic) case.

The second type of mental incapacity deals with a person's competency to stand trial. This incapacity is set up by statute in Article 641 of the Code of Criminal Procedure, which provides that mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. Subsequent articles of the Code of

Criminal Procedure then provide for the manner in which the incapacity is raised, orders for mental examinations, appointment of sanity commissions, reports of sanity commissions and the determination of mental capacity to proceed. Again, however, these statutes are supported and further refined by our jurisprudence; namely, the Louisiana Supreme Court case of State versus Bennett, 345 So.2nd, 1129, Louisiana Supreme Court, 1977, wherein all the criteria are listed there for determination of a defendant's mental capacity to proceed in a criminal prosecution.

The third type of mental incapacity is now before this Court; that is, the mental capacity to proceed to execution.

Since there is no express statement by the Legislature on this subject, it appears that it will be necessary to fashion a standard through analogy with Louisiana's existing statutes and state and federal jurisprudence. This analogy will necessarily take us into the procedural scheme that should be utilized in determining the competency of an individual for execution." (R. pp. 769-771). (Emphasis supplied).

We submit that the State has fulfilled the procedural guidelines attendant to the determination of pre-trial competency to stand trial. A review of the pre-trial competency guidelines and the process afforded to this post-trial condemned inmate conclusively demonstrate the satisfaction of procedural due process.

Assuming that Code of Criminal Procedure Art. 642 et seq. afford some procedural guarantees greater than Ford, the State has met its responsibilities. The inmate has failed to meet his.

These procedural due process guarantees were met and exceeded. Therefore, the trial court's determination of competency to be executed should be upheld.

The inmate appears to intimate that the kind of process (procedural due process) necessary to protect his right (not to be executed while insane) includes the Article 641 requisite of "able to assist in his defense." Such contention is misplaced.

Article 641 is one of a series of articles which deal with pre-trial incompetency. Article 641 is the legislative articulation of a standard or prevailing test for whether an accused possesses the capacity to proceed to trial. The remaining articles provide the procedures for determining whether the standard of 641 is satisfied. Article 641 is not in and of itself a procedure, it is a standard.

The present claim deals with the procedures which are to be afforded to the inmate in determining whether he meets the Ford standard. If we assume that the pre-trial competency articles apply to the post-conviction competency (to be executed) context, then we must recognize that Article 641 is not an espousal of the procedure which governs the determination of the standard (of competence necessary to be executed).

Justice Powell recognized that the proposition requiring an inmate to be "able to assist in his defense" concerns the standard of sanity mandated by the Eighth Amendment prohibition. Ford, 106 S.Ct. at 2608, footnote 3. An inmate does not have a procedural due process right to be "able to assist in his defense." If the inmate has any claim to being "able to assist in his defense" it lies in a discussion of the standard of sanity prerequisite to a defendant's execution. See Argument VI-VII, supra. Neither Powell nor any member of the Ford court addressed the "able to assist in his defense" notion as part of the procedure necessary to enforce the right not to be executed while insane.

Since the necessity of being "able to assist" is part of a standard rather than a procedure to administer the standard, the State respectfully rejects the inmate's claim that art. 641 vests him with some procedural due process rights greater than Ford.

Essentially, Louisiana has neither statutory nor jurisprudential expression of what procedures must accompany the inquiry into competency to be executed. Since neither La. R.S. 14:14 nor La. C.Cr.P. art. 641 are specifically designed to apply to this third type of competency proceeding, we are compelled to accept the trial court's analogy to the several aforesaid procedures. We submit that Ford requires a basic fairness. Basic fairness is satisfied by our statement of Ford's essence. Applying the three-pronged standard of procedural due process renders one answer: Michael Owen Perry is competent to be executed based on a hearing which afforded him (1) the right to present evidence; (2) the right to challenge the expert's opinions on competence to be executed; and (3) an independent decisionmaker. The trial court's determination of competence to be executed was based on a constitutionally appropriate hearing, therefore the finding should be affirmed.

D. The inmate has erroneously characterized the alleged trial court errors, his basis for objection and the hearing standard.

In order to address the inmate's claim of a defective hearing, we must first, however, examine the inmate's erroneous characterizations of the alleged trial court errors. It is incumbent that the record be corrected and set straight. First, the inmate's claims in brief are overstated and simply wrong. Second, the inmate's statement in his brief of objections he raised to the trial court are incorrect. Third, the inmate has fundamentally misstated the procedural due process protections required by the Ford court.

The inmate now suggests that the trial court committed various errors of constitutional proportions in the conduct of the hearing on competency to be executed. Therefore, he suggests that such errors in the hearing deprived him of his right not to be executed while insane.

1. The inmate's claims.

The inmate now claims in his brief that "other evidence" was improperly solicited and utilized by the trial court. He suggests a list of possible rights and guarantees to support his claim of error. The inmate's argument begins with the proposition that "the trial court began ex parte communication with the State. Information was provided weekly to the trial court regarding Michael." (Pet.'s brief, p. 94). From this premise he proceeds to recite his right to be free of hearsay, cross-examination, confrontation, due process, Fifth Amendment (privilege against self-incrimination), and Sixth Amendment (assistance of counsel). Pertinently, the inmate has chosen not to focus on specifics. We choose otherwise.

The dual claims of weekly reports of ex parte communications are erroneous. There is absolutely no proof that the court initiated ex parte communications with any person associated with either the Department of Justice or the Department of Corrections. The trial court's communication with the Department of Corrections was initiated by the Department of Correction Staff Attorney's Motion to File Amicus Curiae Brief. (R. p. 287). This motion was filed on June 10 and signed by the trial judge on June 13, 1988. We note that the trial court ordered copies sent to Mr. Giarrusso, counsel for Perry. (R. p. 288). The Department of Corrections sent

the amicus motion to the trial court on May 25. (R. p. 290). Attached to the motion was a cover letter and pertinent attachments. (R. pp. 289-297). From a review of these documents, it is apparent that the Department of Corrections saw a need to intervene in these proceedings on the basis that they are "the sole custodian of persons who have been sentenced to death in this state." (R. p. 287). Further, by this time of May, 1988, the Department of Corrections was in acute need of guidance as to how to attend to the inmate's mental health difficulties. By May, the Trial Court, the State of Louisiana, the Louisiana State Penitentiary Warden, the New General Hospital medical staff and the Department of Corrections Secretary were all aware of the abuse perpetrated upon the system of justice by Nordyke and Perry. At this juncture, everyone was finally aware of Nordyke's (1) Ex Parte Motion for Delegation of Decision Making Authority (R. p. 2); March 14, 1988 letter to the Louisiana State Penitentiary Warden (ordering termination of medication) (R. pp. 689-691); (3) request for videotaping of inmate only on April 20, 1988 (R. pp. 02; 592-593) ("Nordyke: Your Honor, my investigator has been instructed to put the camera only on the defendant, and to leave it on the defendant, not to scan the courtroom." (Quoting from R. p. 593); and (4) calling of Perry to the witness stand as an "exhibit." (R. p. 661). In view of these actions, it was apparent that the Department of Corrections had an obligation to intervene in the matter in order to determine how they should deal with the inmate and his counsel/do-gooder.

The significance of the above recitation is to demonstrate that Department of Corrections had a duty to be in this case. The inmate's present suggestion that the Court induced their participation is erroneous. Furthermore, it is without foundation in the record.

The inmate's additional assertion that the Department of Corrections provided "weekly reports" is in need of clarification. (Pet.'s Brief, p. 94). The record of this matter contains two basic submissions of background data. First, there are the submissions which were attached to the Motion To File Amicus Curiae Brief. (R. pp. 289-297). Second, there is a two page report of July 6, 1988. (R. pp. 225-226). There are no other reports of any kind in the record which constitute the inmate's alleged "weekly reports."

The inmate contends that these reports (R. pp. 289-297 and 225-226) were unavailable to him. (Pet.'s brief p. 94).

Despite this contention, the inmate's counsel had at least two available sources for these records, not including his client. Initially, he could have bothered to review the case file; also, he could have reviewed the inmate's medical file at New General Hospital. The medical file is available to anyone who bothers to ask. For obvious reasons, the inmate's counsel did not wish to be apprised of, or acknowledge the existence of, these background reports. Specifically, if Mr. Wordyke had chosen to review and utilize February, March and April reports of the New General Hospital at Louisiana State Penitentiary, then his secret order halting Perry's medication would have been available to the State in cross-examining each of the witnesses, including the inmate, in the April 20 hearing.

2. The inmate's objections.

The inmate's counsel states that he:

"[F]iled a written motion [cite omitted] objecting to the court receiving or relying on any such communications, citing expressly Michael's right of cross-examination, confrontation, basic due process, and Sixth Amendment concerns." (Pet.'s Brief, pp. 94-95).

The State respectfully suggests that inmate's counsel misrepresents to this Honorable Court what objections he raised to the trial court. A comparison of his "objections to the additional evidence" and the above quoted passage will reveal a fundamental misstatement. (Compare R. pp. 193-197). In the inmate's four pages of written objections to the trial court, he never once mentioned or intimated the right of confrontation. Examination of the inmate's current brief (quoted above) expressly states that "confrontation" objection was presented to the trial court. Such contention is incorrect.

3. The inmate's statement of hearing standard.

The inmate's counsel states:

"[T]hat determinations of competence must comply with minimal due process, cross-examination and confrontation. In Ford, the concurring opinions of Justice Powell and O'Connor condemned Florida's scheme for failing to provide these protections...." (Pet.'s brief, p. 96).

We submit that such a statement mischaracterizes the opinions of both Powell and O'Connor. Neither Justice Powell nor Justice O'Connor ever opined that minimal due process

requires cross-examination and confrontation. In fact, Powell stated:

"[t]hat ordinary adversarial procedures - complete with live testimony, cross-examination, and oral argument by counsel - are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity. Ford, 106 S.Ct. at p. 2611."

Justice O'Connor even stated:

"[w]hile I would not invariably require oral advocacy or even cross-examination, due process at the very least requires that the decisionmaker consider the prisoner's written submissions. Id., at p. 2613."

Indeed, even Justice Marshall states:

"We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests. Id., at p. 1606."

The inmate's contention that cross-examination and confrontation are fundamental requirements of the Ford court is unsupportable. There is no Justice who states that confrontation is a prerequisite. Even this inmate's quote in his brief reveals that the right is an "opportunity to challenge or impeach ...the [state-appointed psychiatrist's] opinions." (Pet.'s brief, p. 96). (Quoting from Ford, 106 S.Ct. at 2605.)

Seven justices appear to recognize that an inmate has a right to present psychiatric evidence on his own behalf, which will provide probative counterbalancing information to the decisionmaker. Even Justice Marshall states that "a less formal equivalent" to cross-examination may suffice to meet due process standards. Ford, 106 S.Ct. at 2605. The essence of any hearing, though, is to challenge the expert's opinions on the inmate's competency to be executed. Since competency to be executed is the sole issue, challenging of these experts' conclusions is all that Ford's version of due process requires. We respectfully submit that due process requires only that the State's expert witnesses on the ultimate issue be challenged in an adversarial context.

The inmate also suggests that Vitek v. Jones, 100 S.Ct. 1254 (1980) provides support for his contention that full adversarial proceedings are necessary. Vitek is slim support for his contention since the majority stated that:

"The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross-examine." Vitek, 100 S.Ct. at 1265.

The inmate's counsel has mischaracterized the elements requisite for a hearing to meet due process standards. He has also mischaracterized the claimed errors perpetrated by the trial court. Additionally, he has mischaracterized the objections which he preserved at the trial level. As described in sub-part "B" supra, Perry was afforded a vast array of rights and privileges at his hearing to determine competency to be executed. For these reasons, the State submits that the inmate's claims of an inadequate hearing are without merit.

E. The inmate's claims of trial court error regarding the "other evidence" lack merit.

Rather than suggesting some conclusory arguments about the alleged deprivations perpetrated by the trial court, we prefer to scrutinize the alleged errors for denials of Ford's three basic requirements (i.e., (1) right to present evidence; (2) right to challenge expert's opinions on competency to be executed; (3) right to an independent decisionmaker). A thorough and thoughtful analysis will demonstrate that the trial court's conduct of these proceedings surpassed constitutional requirements. We must first, however, begin with the inmate's erroneous characterizations of the alleged trial court errors. We must set the record straight as to the claims, argument and standard of procedural due process.

The inmate claims that the trial court's conduct of the competency hearing failed to meet constitutionally required standards of procedural due process. In support of this alleged failure he points to particular documents in the record. He suggests several broad, conclusory arguments without focusing on the particular documents and their contents.

The State respectfully suggests that the analysis should begin by recognizing what is in dispute. Basically, there are nine pages which require examination. See R., pp. 290-297 and pp. 224-226. (Also see R., pp. 81-88 for a duplicate of R., pp. 290-297). These nine pages are susceptible to grouping for analysis. First, pages 290-291 and 294 may be considered jointly. Second, pages 224-226, 292-293 and 297 may be concurrently reviewed. And third, pages 295-296 should be reviewed together since they are a single report.

1. The Record: pages 290-291 and 294.

(a) Page 290 is correspondence to Judge Hymel from the Department of Corrections staff attorney. This correspondence merely informs the trial court of the May 25th forwarding of the amicus request. It also notes that Dr. Kovac will be following up with weekly reports to the Department of Corrections staff attorney.

Page 291 is correspondence between Dr. Kovac and the Department of Corrections staff attorney. Dr. Kovac iterates that she will be providing the Department of Corrections attorney with weekly reports. Dr. Kovac also states her "observation and understanding" of Perry's status when he is on and off of medication.

Page 294 is a physician's note to the file dated April 29, 1988. This note documents a phone call which Dr. Kovac received from Mr. Nordyke. On this occasion Nordyke, as Perry's "do-gooder," grants his consent to treat Perry's mental health needs with psychotropic medication. (An apparent concession by Nordyke that Perry's mental health improves with psychotropic medication; as well as an indication that Nordyke did not want Perry medicated on the date of his testimony.).

(b) The documents described above are of incidental significance to the question of Perry's competence to be executed. The initial page (290) judges nothing. It contributes nothing. To reiterate, there was only one additional weekly report which was presented to the trial court. That report is dated July 6 and will be discussed below as pages 224-226.

It is of some significance to note that Dr. Kovac's communication was routed to the Department of Corrections staff attorney and not the trial judge. Also, Dr. Kovac preserved her beliefs in reports.

Most importantly Dr. Kovac's "observations and understanding" were similar to her testimony of September 30, 1988. (R., pp. 715; 717-718; 731-732). If there was any reason to believe that Dr. Kovac's report to the Department of Corrections attorney was an expert opinion on the ultimate issue of competency to be executed, then the inmate's counsel

had an unfettered opportunity to challenge and/or impeach her on September 30. Perry's counsel did in fact question Dr. Kovac. Instead of challenging her testimony, Mr. Nordyke's cross-examination confirmed Dr. Kovac's earlier report that Perry responds to medication and decompensates when denied medication. (R., p. 724). A review of inmate counsel's cross-examination reveals that his attempt to impeach the doctor's "observations and understanding" was ineffective.

It is ludicrous for the inmate to now claim that he was denied cross-examination of Dr. Kovac. The trial court allowed him latitude to explore anything that intrigued him. (R. pp. 724-727). Inmate's counsel could have even explored his present allegation that Dr. Kovac provided weekly reports to the trial court. For unknown and unexplained reasons he chose not to even explore this area with Dr. Kovac.

In regard to Dr. Kovac's note of April 29 to the medical file of Perry, it is nonsense to suggest that Perry has been denied cross-examination of this document's declarant, for his own lawyer is the declarant. Further, should there be some significance to this note, Dr. Kovac was available to answer any questions inmate's counsel may have had. Apparently he had none, for he chose to ask no questions.

The State respectfully submits that the presence of these documents in the record fails to prove the inmate's claim of a constitutionally inadequate hearing to determine his competency to be executed. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue; and his right to a fair decisionmaker.

2. The record: Pages 225-226; 292-293; and 297.

(a) Pages 292-293 are a report by a clinical social worker at the penitentiary. The report is addressed to Dr. Kovac. It is dated May 25, 1988 and was prepared at the request of the Department of Corrections staff attorney. The report specifically addresses three questions. They are (1) what behavior does Perry exhibit when taking medicine; (2) what behavior does he exhibit when he initially halts his medicine; and (3) what behavior does he exhibit when he receives no medicine over an extended period of time. The answers to each of these questions is quite predictable, especially in view of the experts' testimony.

Page 297 is a mere three-sentence note to Perry's medical file by his clinical social worker, dated March 23, 1988. The single sentence of any importance states "[h]e appears to be in fair remission at this time." It is difficult to construe this document as either dispositive of or weighing on the question of Perry's competence to be executed. Simply put, this page is of little relevance.

Pages 225-226 are a July 6 report of the same clinical social worker mentioned above. This particular report is addressed to Lawrence Rivet, Louisiana State Penitentiary Mental Health Director. The report is in response to a request for information tendered by the Department of Correction Staff Attorney. This report asks three questions, too. They are: (1) Is Perry currently taking medication; (2) is he manageable on medication; and (3) what is his present mental status?

(b) Both reports, May 25, 1988 and July 6, 1988, cover the same subject matter. That is, they describe the behavior of Perry while on and off of psychotropic medication. The answers to these questions are (1) based on medical records which were available to the inmate prior to the hearing and at each hearing; and (2) based on observations of the experts who did in fact testify subject to cross-examination. Moreover, the observations recorded in each report only mimic the experts' in-court testimony.

On September 30, 1988, Dr. Kovac testified with Perry's medical file in her lap. (R. pp. 716-718). If the inmate's counsel wished to inquire about the contents of either of these reports, he could have addressed his questions to the New General Hospital medical director. Dr. Kovac's stated responsibilities included supervision of the mental health unit. (R. p. 714). The reports of the clinical social worker were directed to her and through her. She was in a position to answer questions of the inmate's counsel. They chose not to examine Dr. Kovac on these reports.

Of greater significance is the fact that both of these social worker reports only mimic the experts' testimony. Dr. Jimenez recognized and testified that Perry's condition improves and stabilizes when on medication and worsens when removed from medication. (R. pp. 519-520 & 524). Similarly Dr. Cox stated that the medication can determine the answer to the question of "what is Perry's behavior on and off of the

medication." (See R. pp 56; 58-61; 67; 70-72 & 76-77). Likewise, even the psychologist Dr. Curtis Vincent admitted that psychotropic medication could improve his condition. (R. pp. 621-622). He made this conclusion despite his lack of training in pharmacology.

Since the experts' answers are of greater value and import to the trial court than the above social worker's reports, there is no reason to require cross-examination of the social worker. Her reports are merely cumulative. If any error occurred, it was harmless and mitigated by the fact that the trial court was in a position to appreciate the value of the psychiatrists' testimony versus that of a social worker.

In Delaware v. Van Arsdall, 106 S.Ct. 1431 (1986), the United States Supreme Court held that a violation of the defendant's right of confrontation was subject to a harmless error analysis under Chapman v. California, 87 S.Ct. 824 (1967). The Court guided us in determining when errors may be harmless beyond a reasonable doubt by stating:

"Whether such an error is harmless in a particular case depends upon a host of factors....these factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Id., at 1438.

Initially, we must presume that we are in a setting which carries the protection of the confrontation clause. From our discussion above of the type of hearing necessary to comport with due process, we now assume that the social worker's reports violated a Sixth Amendment right of confrontation. Assuming the application of the "Sixth Amendment right of confrontation" and the fact that a violation occurred, we suggest that the error was harmless beyond a reasonable doubt.

The bottom line is that neither the report of March 25 nor the report of July 6, 1988 addresses the ultimate issue of competency to be executed. They deal with the tangential question of treatment and its effect. Each of the disputed reports relies on the prisoner's medical file and the diagnosis of Dr. Cox, who did appear and testify twice subject to

cross-examination. Also, it must be recognized that Perry was afforded access to compulsory process. Had he deemed it necessary to cross-examine the social worker, he could have issued a subpoena to compel her appearance and testimony. It must additionally be recognized that the trial court did not prohibit cross-examination. Compare Van Arsdall, supra, p. 1435. As now Chief Justice Rehnquist stated in Van Arsdall:

"[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id. (Quoting from Delaware v. Fensterer, 106 S.Ct. 292, 295) (per curiam) (emphasis in original).

We submit that the inmate had the opportunity for effective cross-examination if he had chosen to exercise his privilege of compulsory process. Since he chose not to produce the testimony of the social worker, he cannot stand to claim that he has suffered a constitutional error.

In regard to the harmless error test, we believe that the use of these reports was incidental in view of the experts' testimony on the same subject matter. In light of the remaining evidence and the fact that Perry was afforded unlimited cross-examination of the experts, the reports were cumulative and therefore harmless error. See e.g., State v. Walters, 514 So.2d 257 (La. App. 5 Cir. 1987).

In brief, the inmate suggests that these social worker reports are in violation of La. C.Cr.P. art. 647. (Pet.'s brief, p. 96). He suggests that art. 647 vests him with the right to cross-examine the maker of the two disputed reports.

This argument lacks merit. Perusal of art. 647 demonstrates why. The article pertinently provides:

"Regardless of who calls them as witnesses, the members of the [sanity] commission are subject to cross-examination by the defense, by the district attorney and by the court."

It is expressly provided that sanity commission members are to be subjected to cross-examination. The purpose in subjecting the sanity commission members to cross-examination is obvious. It is a test of their expert opinions on the ultimate issue of competence. Such a test is unnecessary in regard to the reports of March 25 and July 6, 1988 since neither report

purports to issue an opinion on the issue of Perry's competency to be executed. The reports are merely background information. They give no hint of an opinion that Perry is competent to be executed. Furthermore, there is no indication in the record that these reports were given undue weight by the trial court. In fact, the judge's ruling in this case relied only on the testimony of Doctors Cox, Jimenez, Estes, Vincent and Kovac. (R. pp. 766-792).

In conclusion, we respectfully submit that the presence of these reports in the record fails to prove the inmate's claim of a constitutionally inadequate hearing. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. The inmate enjoyed a hearing which guaranteed basic fairness to him. Therefore, this Honorable Court should conclude that the inmate's allegation lacks merit.

3. The record: pages 295-296.

(a) Pages 295-296 constitute a report dated March 25, 1988. The report is written on a New General Hospital "mental health team progress notes" form. It is drafted and recorded by Randy Parent, a social worker assigned to the care of Perry. The report is based on an emergency room conversation between Perry and Parent. Parent spoke with Perry in the emergency room at the request of Dr. Kovac.

This emergency room report contains statements of Perry about his medical condition, medical treatment, diagnosis, lawyers, competency hearing and electrocution. Also, this emergency room report contains some medical observations of Perry by social worker Parent, in order to assess his medical condition.

The inmate claims constitutional error in the presence of this report in the record. He now objects on the basis of (i) hearsay, (ii) confrontation, (iii) cross-examination, (iv) privilege against self-incrimination and (v) the right to counsel.

(b) (1) HEARSAY.

This report, accurately depicted, is non-hearsay within hearsay. See La. C.E. arts. 801, 802, 803; compare 805. The statements of Perry to Parent are non-hearsay. La. C.E. 801(D)(2)(a) and comments to art. 801 (D)(2). Sub-part (D) of art. 801 provides that:

"A statement is not hearsay if: [2] [T]he statement is offered against a party and is: (a) his own statement, in either his individual or a representative capacity."

The comment indicates that this provision does not change Louisiana's prior law. Perry's statements are non-hearsay for the obvious fact that he "should not be permitted to object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath." C.E., Comments to art. 801(D)(2).

Social worker Parent's report, which recorded the inmate's statements, is arguably hearsay. C.E. 801(A) and (C). Argument can be made that Parent's report was not offered in evidence to prove the truth of the matter asserted (i.e., that Perry's lawyers told him not to take his medication, as opposed to the report used to establish Perry's competence to be executed). Accepting for the moment that Parent's report is indeed hearsay, we submit that it falls within an exception to C.E. art. 802. See C.E. art. 803(4).

Code of Evidence article 803(4) provides that:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment."

We respectfully submit that the March 25 report of social worker Parent was properly received into evidence of this matter. Simply put, Perry's statements to social worker Parent were non-hearsay. The social worker's report is hearsay, but falls within a well-recognized exception where the availability of the declarant is immaterial.

Comments to Code of Evidence art. 803 (4) provide that the declarant (in this situation - Parent) "need not be the patient for this Paragraph to apply." See 4 J. Weinstein and M. Burger, Weinstein's Evidence Section 803 (4)[01], see 803-150. Furthermore, the commentators opined that "[T]he person to whom the statement is made need not be a physician for this Paragraph to apply...." These comments lend support to our contention that Perry's comments to the social worker were properly admitted into evidence. First, it is significant that Perry made the statements while obtaining medical treatment in the New General Hospital emergency room. Second, he was being examined at the request of supervisory physician Kay Kovac. Third, he was examined for purposes of diagnosis and treatment. This conclusion is bolstered by the fact that the social worker ended his report by "A:" [assessment] and "P:" [plan], indicators that the social worker examined Perry for medical purposes. Fourth, 803(4) recognizes that the declarant can be any person with firsthand knowledge of that which he was reporting on. And fifth, a social worker is an acceptable person to obtain the information necessary for diagnosis and treatment. *Id.*, at 803-150.

We respectfully suggest that social worker Parent's report of March 25, 1988 did not violate the inmate's right of cross-examination. It must be recognized that we are in a post-conviction competency hearing context. We are not in a post-accusation adversarial context. Thus, as Justices Powell and O'Connor suggest, the need for adversarial proceedings is accordingly reduced. We believe that there is no need to require cross-examination of a social worker like Parent. As trial Judge Hymel recognized (*R. p.* 771) and even this Court in State v. Perry, (*supra*, pp. 563-564), the procedural articles of 642 et seq. must be used as persuasive analogies. If we look to art. 647, it is defensible to require that only the experts' opinions on competency should necessarily be subjected to cross-examination. Even Vitek, *supra*, at 1264-1265, recognizes that there may be instances in which pragmatic considerations dictate limits on cross-examination. We submit that this Honorable Court should recognize that there is no need to cross-examine a witness who does not render an expert opinion on the ultimate issue of competency to be executed.

The State submits that the presence of the March 25 social worker report fails to prove the inmate's claim of a

constitutionally inadequate hearing. The inmate was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. The inmate enjoyed a hearing which guaranteed basic fairness to him. Therefore, this Honorable Court should conclude that the inmate's allegation lacks merit.

(ii) Confrontation.

(a) In criminal cases, the admission of an out-of-court statement must also satisfy the confrontation requirement. U.S. Const. Amend. VI. Thus, beyond the above argument that the March 25 report is admissible hearsay, we must address the Confrontation Clause. It has been recognized that the hearsay rule is not coextensive with the confrontation requirement. California v. Green, 90 S.Ct. 1930, 1933-1934(1970). Therefore, we are compelled to address the question of: Does the Sixth Amendment guarantee of Confrontation apply in a post-conviction competency hearing; and if so, to what extent?

The Sixth Amendment pertinently states:

"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

As Justice Black stated in Pointer v. Texas, 85 S.Ct. 1065 (1965):

"[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 1069.

The State of Louisiana respectfully suggests that the confrontation clause applies, in a limited fashion, to the post-conviction hearing on the issue of competency to be executed. It is obvious to even the casual observer that the Sixth Amendment guarantee applies to "criminal prosecutions" where an "accused" can confront "the witnesses against him." At present, Perry is not (1) the subject of a criminal prosecution; (2) an accused; or (3) facing witnesses against him in the literal sense. Also, to apply the guarantee of confrontation to a post-conviction competency context is to hoist the policy anchor which stabilizes the Sixth Amendment's

confrontation guarantee. We therefore suggest that the guarantee, at best, applies in a limited fashion. Jurisprudence recognizes that there may be limits placed on the Sixth Amendment's guarantee of confrontation.

We prefer to look to United States Supreme Court jurisprudence which recognizes that:

"[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Chambers v. Mississippi, 93 S.Ct. 1038, 1045 (1973).

Justice Blackmun has written:

"The court, however, has recognized that competing interests, if 'closely examined,' Chambers v. Mississippi, 410 U.S., at 295, 93 S.Ct. at 1045, may warrant dispensing with confrontation at trial. See Mattox v. U.S., 156 U.S. at 243, 15 S.Ct. at 340 ('general rules of law of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case')." Ohio v. Roberts, 100 S.Ct. 2531, 2538.

Finally, Justice White has also recognized that limitations may be placed on the Sixth Amendment. He stated in Vitek, supra:

"The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross-examine." Id. at 1265.

In view of Chambers, Mattox, Roberts, and Vitek, we believe that the trial court reasonably limited the inmate's right of confrontation to the experts who rendered opinions on his competency to be executed. Since the March 25 report of Parent was not an expert opinion on the heart of the issue, there was no need to require either confrontation or cross-examination. For pragmatic reasons (such as limiting the testimony to experts so as to avoid requiring the entire medical staff to leave their station to attend court) we therefore suggest that the trial court had good reason to limit confrontation to the expert witnesses who rendered opinions on competency. Thus, the State proposes that the Confrontation Clause applies in the present competency hearing context only insofar as the experts' opinions on the ultimate issue of competency to be executed. Since the social worker's report of March 25 is not an expert opinion, the inmate's contention of an unconstitutionally conducted hearing lacks merit.

(b) If we assume that the inmate has a right to confront social worker Parent regarding his March 25 report, then the State submits that Perry failed to properly preserve his objection. La. C.Cr.P. art. 841 states:

"An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. It is sufficient that a party, ... makes known to the Court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor."

The inmate objected on several grounds. (R. pp. 194-197). Nowhere in these four pages is there mention of the right of confrontation. Only now, on appeal, does the inmate specifically allege a confrontation violation. (Pet.'s brief, p. 94). Since the inmate failed to preserve his objection on grounds of the Confrontation Clause, this Honorable Court lacks the authority to review his claim. See, e.g., State v. Richmond, 464 So.2d 430, writ den. 467 So.2d 535. The inmate's claim of trial court error therefore lacks merit.

(c) If we assume that the inmate has a right to confront the social worker regarding his March 25 report, and that the inmate has preserved his objection, then we believe that no error has occurred. It is axiomatic that the inmate received the privilege of compulsory process. (R. pp. 1, 688, 747, 762). Compulsory process in this inmate's case allowed him to subpoena medical records and four experts. He was also given at least three opportunities to present evidence by utilizing either subpoenas or subpoena duces tecums. His counsel chose to do neither on each occasion. The trial court imposed no limitations on the inmate's ability to compel the production of either documents or testimony. He, in fact, specifically requested if the inmate's counsel wished to present evidence. Of even greater significance is the fact that each of the opportunities given to the inmate to compel testimony occurred after March 25, 1988, the date of Parent's report.

The United States Supreme Court views the Sixth Amendment guarantee of confrontation as "securing for the opponent the opportunity to cross-examination." Davis v. Alaska, 94 S.Ct. 1105, 1109-1110 (1974). This notion of the confrontation clause guaranteeing an opportunity for

cross-examination has been reaffirmed in Roberts, supra, at 2541, and more recently in U.S. v. Owens, 108 S.Ct. 838, 842 (1988). Additionally, this Honorable Court has concurred in this view of the Sixth Amendment and La. Const. art. 1, §16. See State v. Donald, 440 So.2d 682, writ den. 443 So.2d 1126 (La. App. 2 Cir. 1983) and State v. Hillard, 398 So.2d 1057 (La. 1981).

In Donald, the defendant contended that the trial court erred in failing to require the state to produce the rape victim at trial, in violation of his Sixth Amendment, and art. 1, §16, rights to confront and cross-examine his accuser. The appellate court concluded that no confrontation violation occurred. The rationale for this conclusion of the appellate court was:

"In any case the defense was at liberty to summon the victim to testify at trial, and failed to do so.... Furthermore, he was afforded full opportunity to cross-examine those witnesses who did testify against him. Under the circumstances we find no merit to the defendant's suggestion that his right of confrontation has been abridged." Donald, 440 So.2d at 866.

Inmate Perry finds himself in a predicament similar to that of Donald, cited above. He contends that the trial court failed to compel the state to produce Randy Parent, the maker of the March 25 report. He has, however, failed to explain why he chose not to call the witness on any of the occasions available to him. Perry was afforded the opportunity for cross-examination. He chose to forego it; he should therefore be held to suffer the consequence for not utilizing the available compulsory process. Moreover, it should be recognized that this inmate's situation is not one where he was denied an opportunity for cross-examination. Compare Chambers v. Mississippi, supra, at 1047 and Hillard, supra, at pp. 1059-1060. The State respectfully suggests that Perry's claim of violation of confrontation is lacking in merit.

(d) If this Honorable Court concludes that Perry was denied his right of confrontation by the trial court's conduct of these proceedings, then we proffer that it was harmless error. As stated in Argument XI(E)(2), the United States Supreme Court established a harmless error test for Sixth Amendment violations. Van Arsdall, supra. Some of the factors to be examined in determining whether an error was harmless are

the importance of the testimony, a cumulative nature, corroborating testimony, cross-examination otherwise permitted, and strength of the case. The March 25, 1988 report of social worker Parent is not important in the trial court's decision. It does not purport to determine Perry's competence to be executed through an expert's analysis. Although the report does indicate that Perry understands the competency proceedings, this fact was established by Doctors Jimenez, Cox and Vincent on April 20; Doctors Cox and Kovac on September 30; and Dr. Jimenez on October 21, 1988. Undoubtedly, the facts as stated in social worker Parent's report are cumulative when compared to the doctors' respective expert testimony. The doctors individually and collectively prove and corroborate the facts recorded in the March 25 report. Furthermore, the corroborated facts were subjected to unrestricted cross-examination by the inmate's several counsel. The Parent report's significance is reduced even further by the existence of Mr. Nordyke's March 14, 1988 letter to the Louisiana State Penitentiary Warden. This letter, similar to the March 25 report of Parent, reveals the treachery of inmate and his attorney to undermine the integrity of the competency proceedings. Additionally, there is no proof that the disputed report influenced the trial court's decision on Perry's competency to be executed. Judge Hymel made no mention of the report in his reasons for judgment. Finally, we suggest that there is ample evidence in the form of expert testimony which demonstrates the strength of the State's proof and the inadequacy of the inmate's proof. As stated in Arguments I-VIII, the experts testified that Perry understands the nature of the death penalty and why it is to be imposed upon him. In view of the strength of the State's proof, the cumulative nature of the Parent report, and the unlimited cross-examination of the experts afforded to Perry, the State respectfully suggests that Perry has failed to prove the report's admission was anything but harmless error. Wherefore, the inmate's allegation of a constitutionally inadequate competency hearing should be rejected.

(iii) Cross-Examination.

The Sixth Amendment, in regard to all criminal prosecutions, provides that "the accused shall enjoy the right to be confronted with the witnesses against him." Inmate Perry contends that he was denied his right to cross-examine social

worker Parent concerning the March 25 report. Based upon his denial of the ability to cross-examine Parent, he then demands that this court conclude that the competency hearing was unconstitutionally conducted. We respectfully contend that the inmate's allegation lacks merit since he was afforded his right to present evidence; his right to challenge and/or impeach the experts' opinions on the ultimate issue of competency to be executed; and his right to a fair decisionmaker. Specifically, we believe that any violation of a cross-examination right is meritless because cross-examination is subsumed within the right of confrontation and, in this case: (1) the confrontation clause has limited applicability in a post-conviction competency hearing; (2) the inmate failed to properly preserve his confrontation objections; (3) the inmate failed to exercise his right of compulsory process; and (4) any error committed was harmless.

The Sixth Amendment's guarantee of confrontation does not mention a "right of cross-examination." The jurisprudential gloss on the right of confrontation does, however, indicate the role of cross-examination in our system of criminal justice. In Pointer, supra, Justice Black stated:

"It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." Id., at 1068. (Emphasis supplied).

Also see Ohio v. Roberts, supra, at 2537, and, State in Interest of R.C. JR., 514 So.2d 759 762 (La. App. 2 Cir. 1987).

Pointer and Roberts recognize that the right of cross-examination is subsumed within the Sixth Amendment's guarantee of confrontation. Since cross-examination is an outgrowth of and subsumed within the concept of confrontation, it is only natural to consider a cross-examination violation if there was a right of confrontation. We suggest that Perry had no right to confront Parent about the March 25 report. Further, we wish to incorporate herein our arguments in Argument XI(E)(3)(b)(ii) sub-paragraphs (a), (b), (c) and (d), all in regard to confrontation. We respectfully suggest that inmate Perry suffered no denial of right of cross-examination since, at the least, he could have examined Dr. Kovac about her subordinate Parent and the March 25 report. Further, inmate Perry could have chosen to subpoena Parent on at least three

occasions. Also, it should be noted that inmate Perry has not endured any denial like that of the accused in Chambers, supra, at 1049, since Perry was neither denied the right to present witnesses nor the right to examine Parent on whatever subjects he desired. Moreover, inmate Perry has erred in claiming a cross-examination violation since he failed to properly object on the basis of confrontation. Finally, neither this State nor the Fourteenth Amendment's due process clause have yet required that a death row inmate is entitled to cross-examine anyone but the experts who give opinions on competency.

The State submits that inmate Perry received a competency hearing which was basically fair. A standard of basic fairness is all that is required. In view of the totality of the hearing circumstances we urge this Honorable Court to conclude that the trial court conducted a constitutionally adequate competency hearing.

(iv) Fifth Amendment Prohibition Against Self-Incrimination.

The inmate now claims that the social worker's March 25 report violated his privilege against self-incrimination. Recapitulating, Parent's emergency room report included some statements of Perry about his medication, sanity hearing of April 20, his lawyers, and the electric chair. The report also included the social worker's observations of Perry's then existing physical and mental status. The date of this report is approximately three weeks after the competency interviews of Doctors Cox, Jimenez, Vincent and Estes, but, it is approximately four weeks before the competency hearing of April 20, 1988. Further, the report's existence was not discovered until four weeks after the April 20 hearing. The report was submitted to the Court with the Department of Corrections's amicus brief. (R. pp. 290-297).

In regard to the inmate's claims of Fifth and Sixth Amendment violations, the State herein incorporates by reference our arguments previously presented to the trial court. (R. pp. 213-217; 250-273). Rather than repeating the arguments tendered to the trial court, we now take this opportunity to examine some previously unexplored terrain. Namely, does the Fifth Amendment prohibition against self-incrimination apply to a post-conviction competency hearing? And if so, was Parent's March 25 report a violation of the privilege?

In regard to the applicability of the privilege to the present setting (post-conviction competency hearing), we suggest that there is no authority to now apply the privilege. Specifically, nothing in the several opinions of Ford indicates a Fifth Amendment protection at this stage of the proceedings.

We respectfully suggest that Perry has no right to assert the Fifth Amendment privilege in the present post-conviction competency hearing. In Reina v. United States, 81 S.Ct. 260, 264 (1960), the Court stated that there is "weighty authority" for the proposition that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime...." Perry's conversation with Parent does not invite future incrimination since the trial of guilt and penalty are "final" in the appellate sense of the word. If, for some unknown reason, there is to be a future trial on either guilt or the penalty then the proper remedy would be to suppress the March 25 report and use at trial. There is simply no reason why we should conclude that the Fifth Amendment privilege applies during a post-conviction, post direct-appeal competency hearing.

The question at present is -- how far does the Fifth Amendment reach? We suggest that a line must be drawn at the point where the defendant has been tried, convicted, sentenced to death and exhausted direct appellate review. We are compelled to ask -- what interest is being advanced by affording the privilege to an inmate who awaits execution? Is there an actual possibility that what the inmate says during the psychiatrist's interview will lead to future proceedings?

In Taylor v. Bast, 746 F.2d 220 (4 Cir. 1984), the Fourth Circuit stated:

"[T]he fifth amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future proceedings.' [cite omitted]. Rather than basing the availability of the privilege on the type of proceeding in which it was involved, we must base it on 'the nature of the statement or admission and the exposure which it invites.' [Cites omitted] (Emphasis supplied)." Taylor, supra, at 223.

We believe that the questions asked by Parent and answered by Perry on March 25, 1988, were not of the type which invite future criminal proceedings. That is, the statements do not indicate a crime, a civil cause of action, or any other exposure which dictates sanctions.

In Taylor, the inmate refused to answer questions put to him by a prison psychologist as part of the prison's routine initial screening. Taylor was questioned about his crime and conviction by the prison psychologist for assessment purposes. Taylor was not given any Miranda warnings. Taylor argued that requiring him to answer questions about his crime violated his right against self-incrimination because he was in the process of appealing his conviction. The Court looked to the purpose of the examination (i.e., to evaluate prisoner's custody, treatment, and training needs) to conclude that the right to assert the Fifth Amendment privilege had not been "triggered." The court went on to state that if the evaluation were to be used in a "subsequent criminal proceeding" (i.e., "a sentencing hearing as in Estelle and the analogous parole hearing") that "Taylor would be entitled to have the evaluation suppressed if its content were offered against him and if Taylor had not otherwise waived the right. [Cite omitted]." Taylor, id., at 224.

We believe that Perry's comments to social worker Parent were made at a time when the Fifth Amendment was not triggered. The privilege had not been triggered since Parent's questions were for a purpose unrelated to "subsequent criminal proceedings." Compare Estelle v. Smith, supra, (where defendant had not been yet sentenced or afforded direct appellate review). Further, if the State attempts to improperly utilize the information it is subject to review for the inmate's waiver of his right, suppression and harmless error analysis. See, also, State In Interest of Bruno, 388 So.2d 784 (La. 1980). Recapitulating, there is no authority to extend the applicability of the Fifth Amendment privilege to a post-conviction competency hearing. The conversation between Perry and social worker Parent was not of the type which invites exposure in a "subsequent criminal proceeding," since Perry has already been tried, convicted, sentenced to death and exhausted direct appellate review.

Finally, if we assume that (1) the Fifth Amendment privilege applies during a post-conviction competency hearing; (2) that the statements made to the social worker were compelled by state action; and (3) that the statements were incriminating; then, we contend that the inmate waived his privilege by invoking inquiry into his competency and presenting arguments in support thereof.

The Fifth Amendment privilege against self-incrimination protects an individual from being compelled by the state to provide evidence against himself. In the present circumstances, it must first be recognized that Perry was not compelled to speak with the social worker. Second, the social worker was under no order to conduct the conversation, it merely happened in the routine practice of penitentiary medicine. Third, the prisoner chose to speak during the pendency of a sanity inquiry he invoked and from which he hopes to benefit.

A review of the March 25 report reveals that Perry was brought to the emergency room for medical treatment. Perry was never told that he had to answer any questions. The report itself indicates that the conversation was conducted for the purpose of ascertaining his then existing medical status. There is no indication whatsoever that the social worker knew of the pending sanity hearing until Perry mentioned it. The conversation of this date proceeded exactly like many that occurred before and after this particular date.

We must also consider the fact that Perry has asserted his incompetency and introduced evidence in support of his claim. To allow him to deny the State the opportunity to rebut his claim with relevant evidence is to permit, albeit encourage, fraudulent assertions of mental incompetency.

In Estelle v. Smith, 101 S.Ct. 1866 (1981), the Court held that a court-ordered psychiatric examination of the pre-trial defendant amounted to interrogation. Therefore, the Court found that the statements made during such an examination were inadmissible as a violation of Miranda v. Arizona, 86 S.Ct. 1602 (1966). However, the Court in Buchanan v. Kentucky, 107 S.Ct. 2906 (1987), limited Estelle to its specific facts. Id. at 2917. The Court noted that when a defendant asserts the insanity defense, introduces supporting psychiatric testimony,

or requests a psychiatric examination, he has no Fifth Amendment privilege against the introduction of the psychiatric testimony by the prosecution. Id., at 2917-2918. In Buchanan the court held that the introduction of other psychiatric reports concerning the defendant's mental state for rebuttal evidence did not violate the Fifth Amendment.

In the case at bar, there is no evidence that Perry was compelled to submit to the talk with the social worker. Further, Perry's situation significantly differs from that of Smith. First, Smith had not even begun his trial proceedings when the statements were elicited from him, and, he was in his penalty phase when the statements were utilized against him. In Perry's case, the statements were made post-trial, post-conviction and post-appellate review. Further distinguishing Perry is the fact that the statements are being used as rebuttal to a claim of incompetency where proof in support thereof has been produced by the inmate. In addition, social worker Parent has simply fulfilled his ordinary duties. There is no indication that he acted as an "agent of the state" attempting to subvert the inmate's assumed right not to speak.

In Smith, supra, the Court opined:

"Nor was the interview [by Dr. Grigson of Smith] analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. [cites omitted]." Id., at 1874. (Emphasis added).

In Smith, the defendant neither tendered an insanity claim nor produced evidence in support thereof. Thus, the Court was constrained to find that the defendant had not waived his Fifth Amendment privilege and the statements made to the psychiatrist were therefore in violation of the Miranda prophylactic rule. In contrast, Perry did initiate sanity proceedings. Since Perry initiated the proceedings, he is necessarily construed to have waived his Fifth Amendment privilege, there is no duty to inform him of Miranda warnings prior to communications with him

about his competency. In view of the fact that no Fifth Amendment privilege existed, the March 25 report of Parent was not in violation of Perry's privilege against self-incrimination.

In Yardas v. Estelle, 715 F.2d 206 (5 Cir. 1983), the Court reaffirmed Battie v. Estelle, 655 F.2d 692 (5 Cir. 1981), wherein the court stated "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's Fifth Amendment privilege.... [Cite omitted]." Yardas, supra, at 209.

More recently in Schneider v. Lynaugh, 835 F.2d 570 (5 Cir. 1988), Judge Rubin stated:

"[A] defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind -- as involving a 'waiver' of Fifth Amendment rights, [Footnote omitted]" Id., at 575.

Finally, in State v. Jones, 359 So.2d 95 (La. 1978), Justice Tate stated that:

"[T]he privilege against self incrimination does not apply against requiring the accused to participate in a sanity commission. Lafave & Scott, Criminal Law, Section 340, pp. 310-312 (1972). The reason is often grounded upon a limited waiver of the privilege, for the limited purposes of the sanity commission." Id., at 97. (Emphasis provided).

In each of the above cases, there is recognition that a defendant relying upon a claim of incompetency can be compelled to submit to state interviews on the subject. Simply put, the defendant has forfeited his right to the privilege against self-incrimination during the pendency of and scope of a determination of competency. If the State can compel a pre-trial defendant to submit to a state psychiatric examination, a fortiori, the State can utilize Perry's voluntary statements of March 25 to social worker Parent.

Basically, on March 25 the State could have compelled Perry to discuss his competency with Parent. By this date, Perry had already claimed incompetency, subpoenaed medical records, and the doctors had already interviewed him. The State did not compel Perry to speak with Parent. Conversely,

the State did not require Parent to interview Perry. The conversation was a spontaneous, routine conversation between a mental health team worker and Perry. If this conversation had been elicited by state design, then surely it would have been in the State's arsenal of cross-examination at the April 20 hearing. Since the State did not utilize the March 25 report at the April 20 hearing, it is obvious that there has been no attempt by the State to trick or deceive the inmate and there has been no state compulsion by Parent of Perry. Essentially, we now suggest that if the State could have compelled the March 25 conversation, then certainly Perry could have voluntarily engaged in the conversation.

If we permit Perry to claim a Fifth Amendment privilege as to the March 25 report of the social worker, then we are subverting the values underlying the privilege. As Judge Rubin stated:

"[T]he principle [of waiver by a defendant who puts his mental state at issue] reflects the court's attempts to maintain a 'fair state-individual balance,' a value underlying the privilege itself. [Cite omitted]. It is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony. [Cite omitted] The principle also rests on 'the need to prevent fraudulent mental defenses.'" [Cite omitted]. Schneider v. Lynaugh, supra, at 575-576.

At present we have Perry claiming that the March 25 report is inadmissible as a violation of his privilege against self-incrimination. We submit that such claim is misplaced since he has waived the privilege by instituting the current competency proceeding. (R. p.001-1; and the Motions of Mr. Nordyke which were sealed in the record on January 21, 1988). Further, if we are to accept the claimed privilege then we ignore the policy underlying the privilege, that is to maintain a fair individual-state balance. To omit the March 25 report is to constrain the trial judge's decision to the brief examinations of the sanity commission appointees -- to so limit the trial judge's factual input is to contravene the Ford court's hope that all relevant evidence will be available to the decisionmaker. Further, to so limit the trial judge's factual input is to contravene "the need to prevent fraudulent mental defenses." As Dr. Cox stated in part, we can determine the true existence of mental illness by observing an individual

over an extended period of time. (R. p. 565-566). A lengthy observation will facilitate an accurate determination for it is difficult for an individual to feign illness around the clock over a course of weeks or months. To omit consideration of the March 25 report is to deny the decisionmaker an opportunity to make a truly informed decision on Perry's competency to be executed. We respectfully suggest that the March 25 report meaningfully advances the Fifth Amendment policy of preventing fraudulent mental defenses. Therefore, we submit that the inmate's claim of an unconstitutionally conducted hearing lacks merit.

The inmate received a competency hearing which was basically fair. He was afforded the right to present evidence; the right to challenge and/or impeach the state's experts' opinions on the ultimate issue of competency to be executed; and he was afforded a fair decisionmaker. We urge this Honorable Court to reject Perry's contention that he possessed a Fifth Amendment privilege in regard to the March 25 report of social worker Parent.

(v) Sixth Amendment right to assistance of counsel.

The inmate's final claim of infirmity regarding the trial court's admission of the March 25 report is the Sixth Amendment right of counsel. Perry now claims that he had a right to counsel that was violated by Parent's conversation of March 25.

This issue has been previously discussed by the State. (R. pp. 213-217; 250-273). The prior discussion is herein incorporated by reference. Rather than repeat the same arguments, we will limit our present discussion to previously unconsidered matters.

In order to reach the issue - of whether Parent's March 25 conversation with Perry was a violation of the Sixth Amendment guarantee of assistance of counsel - several predicate obstacles must be hurdled. First, we must assume that the Sixth Amendment guarantees counsel during a post-trial, post-direct appeal, post-conviction competency hearing. Second, we must assume that Parent's interview was a product of either court or state order. Third, we must assume that Perry's counsel had neither actual nor constructive notice

that such an interview would occur. Fourth, we must assume that the inmate's claim of incompetency and related proof do not constitute a waiver of the Sixth Amendment right to the assistance of counsel.

First, we respectfully suggest that there is no authority which requires that Perry be provided with counsel during a post-conviction competency hearing. The only arguable authority is C.Cr.P. art. 930.7(B). See, contra, Giarratano v. Murray, 847 F.2d 1118 (Cir. 4 1988), writ granted, 888-411, 44 Cr. L. 4061 (Oct. 31, 1988).

Second, we respectfully suggest that Perry's conversation with Parent significantly differs from Estelle v. Smith, supra, and others. In the present case, there is absolutely no compulsion by the State to require the conversation. The plain and simple truth is that the inmate's counsel removed him from treatment on March 15, ten days prior to Parent's conversation. Because of inmate counsel's actions, it was inevitable that Perry would decompensate. The decompensation, as many times before, led to the hospitalization of Perry in the New General Hospital. And, as many times before, the hospitalization for decompensation led to the emergency room physicians asking for a mental health team progress report on Perry's mental status. As one would normally expect, the conversation naturally turned to the status of Perry's medication. Thus, we have the present March 25, 1988 report of social worker Parent. We suggest that this scenario indicates no state coercion in obtaining the March 25 report, therefore, the Sixth Amendment should not bar its utilization in this Court's review of this matter.

Third, we suggest that Perry's counsel had either actual or constructive notice that Parent's March 25 conversation with Perry would occur. The notice necessarily stems from Wordyke's March 14 secret letter to the Louisiana State Penitentiary warden. Said letter ordered the immediate termination of all medication prior to the April 20 hearing. We believe that Wordyke's termination of Perry's medication placed him on notice that Perry would decompensate to a point where someone would ask why he was not taking his medicine. By placing Perry in such a position, inmate's counsel must be held to have recognized that future contact with the penitentiary's medical personnel was inevitable, and that a conversation like that of March 25 was likely to occur.

In State v. Comeaux, 514 So.2d 84 (La. 1987), this Honorable Court interpreted the Sixth Amendment to require the State "to give defense counsel notice of its intent to examine defendant." *Id.*, at 99. In a footnote, this court recognized the Estelle v. Smith, *supra*, at 1874, notion of an implied waiver when a defendant puts his mental condition at issue.

We likewise believe that Perry has put his mental condition at issue and his counsel has precipitated the conversation of March 25. Thus, this court should conclude that no Sixth Amendment violation occurred when Perry voluntarily chose to speak to social worker Parent during the pendency of an examination he initiated and hoped to use as a loophole to execution. This inmate and his counsel knew, because of their own acts of March 14, that psychiatric type examinations and discussions would occur.

Fourth, we suggest that the inmate's claim of incompetency and related proof constitute a waiver of the Sixth Amendment right to the assistance of counsel. Accord Vardas v. Estelle, *supra*, and Schneider v. Lynaugh, *supra*.

If each of the above four obstacles are hurdled, then we urge this Honorable Court to embrace Satterwhite v. Texas, 108 S.Ct. 1792 (1988).

In Satterwhite, *supra*, the Supreme Court considered whether it was harmless error to introduce psychiatric testimony obtained in violation of Estelle v. Smith, *supra* (i.e., defendants formally charged with capital crimes have a sixth amendment right to consult with counsel before submitting to psychiatric examinations designed to determine future dangerousness). The court held that:

"[T]he Chapman harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith." 108 S.Ct., at 1798.

The Court stated that the harmless error rule:

"[P]romotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.*, at 1797. (Quoting from Delaware v. Van Arsdall).

The court considered the relevant harmless error question to be "whether the State has proved 'beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Chapman, 386 U.S., at 24." Satterwhite, 108 S.Ct., at 1798. In order to answer this question, the Satterwhite Court scrutinized the evidence introduced to determine if it contributed to the verdict obtained. Dr. Grigson was the state's final witness. Grigson stated his educational background in psychiatry. He stated, among other things, that Satterwhite was a "continuing threat to society;" Satterwhite had a "lack of conscience;" was as "severe a sociopath as you can be;" on a scale of one to ten "Satterwhite is a 'ten plus;" and he told the jury that "Satterwhite was beyond the reach of psychiatric rehabilitation." Satterwhite, 108 S.Ct. at 1799. In Satterwhite's case, the Court found that Dr. Grigson's disputed testimony was "powerful and unequivocal," thus the court concluded "we find it impossible to say beyond a reasonable doubt that Dr. Grigson's expert testimony on the issue ... did not influence the sentencing jury." Satterwhite, 108 S.Ct., at 1799.

In the present case of inmate Perry and the March 25 report of social worker Parent, it is difficult to conclude that the report is so "powerful and unequivocal" as to say that the trial court's ruling is flawed. We respectfully suggest that Parent's report did not contribute to the verdict obtained. The report pales in significance when compared to the testimony of Doctors Cox, Jimenez and Kovac. Each of these experts found Perry to be competent to be executed. Dr. Jimenez revealed Perry's wish not to die, his comparison of himself to Charles Manson; and Dr. Kovac stated Perry's acknowledgement that "if I take the pills I die, if I don't I live." All of that which exists in the disputed report appears multiple times in the record of these proceedings. Perry uttered identical statements, thoughts and beliefs to each expert as he did to social worker Parent. We submit that Parent's report does not nearly equal that of Dr. Grigson in Satterwhite, *supra*, and therefore, the State has proven beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

We respectfully urge this Honorable Court to conclude that the trial court's conduct of these proceedings surpassed all constitutional requirements and, accordingly, the trial court's determination of competency to be executed is correct.

CONCLUSION

It is easy to become totally absorbed by the logic and persuasion of legal arguments, especially in a brief which spans two-hundred pages and considers res nova issues. We must not, however, forget what brought us here. If we do, humanity is lost. The fact is, that five innocent, kind and simple souls have prematurely departed this life. To remain aloof and forget that Michael Perry took the lives of those who loved and cared for him is to forfeit our pathos. Each of us must feel some sorrow for the tragedy that occurred and the naked truth that a cousin, an uncle, a son - Michael Perry - senselessly consigned five family members to unexpected, early graves. It goes not make sense. None of us can explain why it happened. Chances are that none of us could have prevented what happened. Reality is that we cannot return them to this life. The future is ----- justice now.

Burned into my memory are certain recollections of this case. Recollections like watching adult jurors weep when listening to testimony; cry when examining the evidence; sob as the verdicts were returned; and console one another as they completed their civic and moral responsibilities. Indelibly etched in my memory are the moments when those of us who presented the case cried with the jurors.

The scars seared in the memories of family members, witnesses, jurors, court personnel and casual observers will never be erased. We can only pray that they will fade. Our pathos must sustain us, but not jade us. Likewise, our logos must guide us, but not blind us. We must resist the urge to claim the right to vengeance as we must resist the urge to blindly focus on either the merits or demerits of the death penalty. The temptation to now focus exclusively on Michael Perry is not just; nor is the temptation to invoke the memories of slain family-members. What is just, however, is fidelity to our system of laws, which must remain blind. Our laws allow for and dictate a penalty of death in this matter. We beseech you to consider this case with a pragmatic sense of what is just. With such consideration, we are confident that the trial court's decision will be affirmed.

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared RENE' SALOMON, who, being by me duly sworn, deposed that the foregoing response on behalf of the State of Louisiana to death row inmate's writ application for supervisory and remedial writs from a post-conviction competency ruling is true to the best of his knowledge and belief; and that a copy of this brief has been forwarded to the Honorable L. J. Hymel, 19th Judicial District Court, and all counsel of record in this case by depositing same in the U. S. Mail, postage prepaid.

1989

Baton Rouge, Louisiana, this 29th day of March.

Rene' Salomon
AFFIANT

Notary Public
NOTARY PUBLIC

Artie DeLanewille
WITNESS

Anthony J. Fugere
WITNESS

ORIGINAL SUPREME COURT OF THE UNITED STATES

NO. 89-5120

ORIGINAL

Supreme Court, U.S.
FILED

SEP 26 1989

JOSEPH P. SPANIO, JR.
CLERK

MICHAEL OWEN PERRY,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

ORIGINAL BRIEF ON BEHALF OF RESPONDENT,
THE STATE OF LOUISIANA,
IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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ISSUES PRESENTED

- I. May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?
- II. Assuming that: (1) competency to be executed may be medically achieved and maintained without the prisoner's consent, and (2) the condemned inmate has a constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to treatment?

SUMMARY OF THE ARGUMENT

The State of Louisiana argues that this Honorable Court in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986) implicitly recognized that competency to be executed could be achieved and maintained through the administration of antipsychotic medication. While the Eighth Amendment under Ford prohibits the execution of the insane, post-conviction insanity was defined [as a condemned inmate who was unaware of his impending execution and the reason for it] by Justice Powell in his concurring opinion. Competency is the sole inquiry; how that competency is achieved and maintained is not a factor. Medication can help assure the inmate that he will be aware of his impending death and the reason for it. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

The administration of the antipsychotic drug Haldol to the petitioner does not violate his rights under the Eighth Amendment. Haldol is a medically recognized treatment for anyone suffering from schizoaffective disorder. The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency.

This Honorable Court in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989), held that the Eighth Amendment does not prohibit per se the execution of an inmate who is mentally retarded. A fortiori, a death row inmate who is mentally ill and whose competency for execution is achieved and maintained by medication should have no greater right than a mentally retarded inmate, whose mental state cannot be improved through medication. The State of Louisiana argues that

once a mentally ill inmate has been sentenced to death, his mental illness is irrelevant unless it affects the de minimus competency standard as outlined in Ford.

A pre-trial detainee may be subjected to trial despite the fact that his competency is achieved and maintained by medication. Louisiana has recognized this principle in its jurisprudence since 1969. Because a condemned inmate is entitled to diminished constitutional protections, he should not be afforded greater rights than a presumptively innocent individual who faces trial. Once a condemned inmate is declared competent for execution, his medication should be a factor only if it impinges upon the de minimus competency requirement.

The State of Louisiana does not concede that Michael Perry has a liberty interest to be free from the forcible administration of an antipsychotic drug that is designed to achieve and maintain competency for execution. However, if such a "right" exists, the State argues the liberty interest was extinguished when a validly imposed sentence of death was rendered by the jury. In the alternative, should the Court hold that Perry retained his liberty interest despite his conviction, the State of Louisiana argues that his interest must give way to the State's overriding and legitimate interest in carrying out the sentence retribution.

Despite the inmate's wishes, the State of Louisiana, under its *parens patriae* and police powers, has an affirmative duty to provide all incarcerated inmates with adequate psychiatric care, including the administration of antipsychotic medication. Deliberate indifference to the inmate's mental health violates his constitutional guarantees under the Eighth Amendment.

Both federal and state statutes subsume the necessity of medical treatment with a judicial finding of incompetency to proceed to trial. A death row inmate who has raised the shield of incompetency to proceed to execution has implicitly authorized the State to medicate him, if necessary, to achieve competency.

The petitioner has the burden to prove a national consensus against forcibly medicating death row inmates. He has failed to do so. Furthermore, the petitioner's counsel has not established a conflict in the district courts, which allow forcible medication of civil committees and pre-trial detainees, provided professional judgment is exercised, and judicial review is provided.

The trial court's determination of competency to be executed (i.e., competent only when medicated) was made in accord with Ford v. Wainwright. The procedural due process which governs the inquiry into competency to be executed requires that the State afford the condemned inmate with: (1) an "opportunity to be heard"; (2) an opportunity to challenge the experts' competency findings; and (3) an impartial decisionmaker. Inmate Perry enjoyed procedures far in excess of de minimus constitutional standards. Further, the trial court's conduct of the proceedings was eminently fair and conscious of the significance of the proceeding.

The trial court ordered treatment of the condemned inmate premised upon the findings of competence only when maintained on medication. The treatment order was made in accord with this Honorable Court's decision in Vitek v. Jones, which implicitly recognized that nonconsensual treatment may occur as a result of a determination that treatment is needed. Alternatively, if due process requires an additional decisionmaking process prior to nonconsensual treatment, then such decision is left to the professional judgment of medical personnel at the custodial institution.

INTRODUCTION

In Ford v. Wainwright 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 355 (1986), this Honorable Court held that a state could not impose the death penalty upon a prisoner who had become insane subsequent to his conviction. To do so, the majority of this Court concluded, would be cruel and unusual punishment under the Eighth Amendment. Writing for the plurality, Justice Marshall stated that neutral, expert opinions should allow a court to focus on "the prisoner's ability to comprehend the nature of the penalty" and that the condemned inmate's mental illness must prevent him from "comprehending the reasons for the penalty or its implications." Ford 106 S.Ct. at 2606. Justice Powell, concurring in part and concurring in judgment, was the only justice to directly address the standard by which post-conviction competency should be measured. That standard - whether the condemned inmate is aware of his impending execution and the reason for it - has subsequently been cited with approval by Justices Brennan and Marshall, in Johnson v. Cabana, ___ U.S. ___, 107 S.Ct. 2207, ___ L.Ed.2d ___, (1987) (Brennan, Marshall, J.J., dissenting) and most recently, in Perry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934 (1989), ___ L.Ed.2d ___, (1989). In Perry this court held, in part, that the Eighth Amendment did not prohibit the execution of a

mentally retarded person with the reasoning ability of a 6 1/2-year-old child. Ford, furthermore, was cited in Perry for the premise that "someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed." Perry, 45 Cr.L. at 3196 (1989), citing from Ford, 477 U.S. at 422 (1986) (Powell, J., concurring in part and concurring in judgment.)

New questions which necessarily evolved from the Ford and Perry decisions are now before this Honorable Court. Is a death row inmate's execution stayed simply because his competency is achieved and maintained by medication? May a condemned inmate refuse medication that is designed to achieve and maintain competency as a means to thwart the imposition of a legally imposed death sentence? Does a death row inmate have a constitutional right to choose insanity over the electric chair? The State of Louisiana respectfully argues that the competency constitutionally mandated by Ford may be achieved and maintained, if necessary, through nonconsensual, medically supervised treatment, including the administration of antipsychotic medication. The authorities discussed below indicate that a death row inmate simply cannot be allowed to choose insanity as a means of granting his own personal stay of execution.

Petitioner, death row inmate Michael Owen Perry, is before this Court seeking writ of certiorari primarily on the grounds that the nonconsensual, medically supervised administration of the antipsychotic drug Haldol to meet the Ford standard violates his rights under the Eighth and Fourteenth Amendments. Before addressing these issues in detail, the State of Louisiana first would like to alert this Court to the many inaccuracies contained in the petitioner's brief. First, there is no evidence in the record that Michael Owen Perry has ever been medicated against his will.¹ Any medication administered, has been only upon his physician's

1. Counsel for the petitioner can point to no record reference that shows that Michael Owen Perry has been forcibly administered either oral or intramuscular medication. The State of Louisiana, thereby, questions whether Perry even has standing upon which this issue may be addressed.

order and directive, and administered only at regulated intervals.² While on medication, Perry's mental condition stabilizes so that he is not a danger to himself or others. The medication eliminates Perry's delusions and hallucinations. At times, Perry himself has requested the medication. An additional benefit is that Perry's competency for execution is also maintained. It is this latter benefit that troubles Perry.

Relying on Louisiana's jurisprudence that adopted the Ford standard as the de minimus test for competency to be executed, the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, ruled on October 21, 1988 that Michael Owen Perry is competent to be executed because "he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment." (R. pp. 0784-85.) The district court's holding was bifurcated. While Perry is competent to be executed, that competency is achieved and maintained only through the administration of Haldol. (R. p. 0005). This implies that Perry is not competent for execution in his unmedicated state. There is no dispute that Perry suffers from schizoaffective disorder; all doctors who have examined him have made the same diagnosis. The mental illness, however, can be controlled through the use of antipsychotic medication, much like diabetes is controlled by insulin injections. The structure of this brief will be first to establish the arguments underlying the State's position that medically induced competency is constitutionally acceptable under Ford. Next, the State will argue that a condemned inmate must be medicated without his consent if such medication is necessary to carry out a legally imposed death sentence. Finally, the State will address the procedural due process protections that may be required for the condemned inmate.

The State of Louisiana respectfully contends the sole focus should be on competency, regardless of how it is achieved or maintained, and regardless of whether the condemned inmate consents to the necessary medical treatment or not. Otherwise,

2. Medication is administered routinely (R. p. 0753-54) that is, one monthly intra-muscular injection and a daily oral supplement three times per day. Doctors also testified that Perry's condition only improves with medication. (R. p. 0557). Counsel for the petitioner has stated that Perry decompensates even while on "massive" dosages of antipsychotic medication. This statement is taken out of context. In fact, Dr. Cox testified that if Perry was still hallucinating despite the medication, one solution was to increase the dosage. (R. p. 0737-38). Perry must be on a consistent medical treatment plan for three months just to stabilize his mental state. (R. p. 0742-44).

a death row inmate has the power to thwart the State's attempt in carrying out a validly imposed death sentence. Most importantly, the State of Louisiana beseeches this Honorable Court to deny the petitioner's request for writ of certiorari. As stated above, there is no evidence in the record that Perry has ever been forcibly medicated. Furthermore, Perry has pointed to no conflict in the district courts concerning the relevant legal issues.

ISSUE I.

May the Ford v. Wainwright standard of competency to be executed be achieved and maintained through nonconsensual, medically supervised treatment?

ARGUMENT

1. Ford v. Wainwright implicitly recognizes that medically aided competency achieved by the administration of antipsychotic medication is acceptable for purposes of competency to be executed.

The State of Louisiana contends that medically aided competency is sufficient competency for execution under the Eighth Amendment. The rationale behind the competency standard as announced by Justice Powell, is to ensure that the two major purposes of the death penalty - retribution and deterrence - are served. Synthetic competency serves both purposes. First, the antipsychotic medication assures the mentally ill condemned inmate that he has sufficient mental capacity to understand that he is being executed for the crimes he committed. Thus, retribution is served. Second, the medication achieves and maintains competency so that the execution may lawfully take place. Therefore, the deterrent factor for society as a whole is served.

The State's position that synthetic competency is sufficient under Ford is further supported by the reasons for requiring that a minimum competency level be met. A stay of execution under Ford is not triggered unless the condemned inmate is so mentally deficient that he is unaware of his impending execution and cannot comprehend the reason for it. The medication itself has no bearing on the reasons competency is required. Either the inmate is competent or he is not. If anything, medication actually enhances an inmate's level of competency. Therefore, the inmate's competency, whether or not medication is involved, should be the sole inquiry.

The resolution of this issue may very well affect the State of Louisiana's right to demand retribution from this petitioner. Expert testimony at Perry's sanity hearing was unanimous that Perry, medicated or not, presently knew of his impending death and the reason for it. Dr. Cox expressed the opinion, however, that if Perry is allowed to remain off

antipsychotic drugs for as little time as three weeks, Perry may decompensate to the point of being incompetent for execution. (See Dr. Cox's report, dated April 20, 1988). Therefore, under the Ford standard, the State of Louisiana's right to seek retribution against Perry may very well be hinged upon its right to forcibly medicate him, if necessary. A death row inmate should not be allowed to escape execution under Ford by refusing medication necessary to achieve or maintain competency.³

If medication is a factor in the competency equation than this presupposes that a mentally ill capital offender has greater constitutional rights than a capital offender who is not mentally ill. Furthermore, medicine administered to a condemned prisoner to prevent delusions and hallucinations also can only enhance that inmate's chance "to prepare mentally and spiritually, for their death" as Justice Powell said in Ford, citing Coke. Ford, 105 S.Ct. at 2608. The Eighth Amendment assures an inmate that he will be given time to prepare for his death, and that he will know the reason why his life is being extinguished. Medication satisfies the Eighth Amendment mandate that these assurances are met. If Perry is allowed to avoid his death sentence by refusing to submit to medical treatment, the result would be that a death sentence would be decided on the fortuity of whether the condemned inmate voluntarily chose to be medicated or not. Mentally ill death row inmates would thereby have greater rights than those who are not mentally ill.

The State's position that a mentally ill death row inmate has no greater rights than any other death row inmate is further supported by the Court's opinion in Murray v. Giarratano, ___ U.S. ___, 109 S.Ct. 2765, ___ L.Ed.2d ___ (1989), 45 Cr. L. 3155. Giarratano held that in a post-conviction proceeding, a state could validly deny under the Eighth Amendment and the Due Process Clause appointed counsel for an indigent offender, whether or not the offender was sentenced to death row. In other words, this Court recognized that a capital offender had no greater right to counsel during post-conviction relief, than did a non-capital offender. Likewise, the State of Louisiana posits that the

3. The record clearly supports a strategy between Perry and his counsel to refuse medication, and thereby induce insanity as a loophole to execution. (R. pp. 0753-54; 0717-18). Perry himself said: "...[I]t's just -- it's very simple to understand, take my pills and die, don't take my pills and live ... so I'm not going to take my pills." (R. p. 0717-18).

status of mentally ill should not carry with it greater constitutional protections. A death row inmate should be held to the same standard of competency, whether or not he is mentally ill, and whether or not he is medicated.

While Ford did not directly address the issue of synthetic competency, the words of Justice Powell intimate that medication to achieve sanity is presumed to follow a stay of execution:

"It is clear that an insane defendant's Eighth Amendment interest in forestalling his execution unless OR UNTIL he recovers his sanity cannot be deprived without a 'fair hearing'." Ford 106 S.Ct. at 2609 (Powell, J., concurring). (Emphasis provided).

Justice Powell's footnote in Ford even more clearly establishes that competency achieved through medication would satisfy the Eighth Amendment. As Justice Powell so aptly stated in his opinion, the question is not WHETHER Perry will be executed, but WHEN. Justice Powell continued in a footnote:

"It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that IF PETITIONER IS CURED OF HIS DISEASE, THE STATE IS FREE TO EXECUTE HIM." Ford, 106 S.Ct. at 2610 (Powell, J., concurring) (footnote No. 5). (Emphasis provided).

These words of Justice Powell indicate that once incompetency is judicially established, the condemned inmate should then be treated in an attempt to restore sanity. Once sanity is restored, the inmate is again eligible for execution. This is precisely the procedure recognized at common law in Louisiana since 1896. (See State's Brief to the Louisiana Supreme Court, Appendix A, p. 96). Treatment of a mentally ill prisoner necessarily implicates medication; otherwise, in most instances, no cure or remission of the illness is possible. Therefore, the State of Louisiana respectfully submits that competency, whether or not medication is involved, is all that Ford requires.

(a) The administration of antipsychotic medication to a mentally ill prisoner is not cruel and unusual punishment.

The petitioner's counsel has equated Perry's medication as punishment itself under the Eighth Amendment, which is an incorrect conclusion. The Eighth Amendment only

prohibits cruel and unusual PUNISHMENT. The punishment in this case is death by electrocution, a validly imposed sentence under the Eighth Amendment, which is applicable to the states through the Fourteenth Amendment. Haldol is a medically recognized treatment for anyone afflicted with Perry's mental illness. Haldol is not being administered to him because he premeditated the execution of five family members including his parents and a 2-year-old nephew. Haldol is a medicine prescribed for many individuals who suffer from mental illnesses or disease. Therefore, opposing counsel is misdirecting the Court's attention when they attempt to argue that the medication administered to Perry is cruel and unusual punishment under the Eighth Amendment. At best, the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out.

The State can best illustrate its position that Haldol itself is not punishment by pointing to an outstanding All-American basketball player, Chris Jackson of Louisiana State University. Jackson, who takes Haldol on a daily basis for a neurochemical disorder called Tourette's syndrome, needs the medication to avoid uncontrollable twitching and spasmodic body movements. (See Appendix A, p. 162). This example further illustrates as absurd any of the petitioner's arguments that equate the administration of Haldol to Perry as the equivalent of a frontal lobotomy.

The sincerity of opposing counsel's concern for Perry's well-being is also suspect, at best. Petitioner's counsel, Keith Nordyke, had ordered Perry abruptly removed from his medicine just prior to an upcoming courtroom appearance, without any consideration whatsoever for the consequences that are suffered with sudden withdrawal from antipsychotic medication. Nordyke's "Do-Goode" motion was in actuality an attempt to induce a calculated insanity as a means to avoid a validly imposed death sentence. Nordyke's decision was aimed at defeating the death penalty, even if that meant Perry may become insane. Ironically enough, Nordyke himself is attempting to sentence Perry to a life of incarcerated insanity, which is certainly a cruel and unusual punishment under the Eighth Amendment. Now he appears before this Honorable Court to argue that the administration of medication, to which all doctors have testified alleviates the symptoms of Perry's illness while at the same time achieves and maintains competency, is cruel and unusual punishment.

In fact, the medicine is in both Perry's and the State's best interests. Dr. Cox, one of Perry's treating

psychiatrists, has recommended that Perry be treated with Haldol. The trial court during Perry's competency hearing questioned Dr. Cox concerning the medication, and asked whether any less intrusive medicine could stabilize and improve Perry's mental state. Dr. Cox responded: "No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs..." (R. at p. 0745). Professional medical opinion, thereby, supports the administering of Haldol to Perry as the means best designed to serve his medical needs. At the same time, Haldol serves the State's purpose of achieving and maintaining competency for execution. There is also no alternative, less intrusive, medication that will satisfy the same needs.

Opposing counsel has also strenuously objected to the administration of antipsychotic drugs because of side affects that may occur. Yet nothing in the record supports the fact that Perry now suffers from any side effects. Dr. Cox stated he has never seen Perry suffer from any side effects (R., p. 0746) and that he does not now suffer from tardive dyskinesia. (R., p. 0574-75). Dr. Cox also predicted that even if Perry was continuously medicated with antipsychotic medication for the next five years he had only about a one in four, or one in five, chance of developing tardive dyskinesia, the most severe possible debilitating side effect. (R., p. 0574-75). There is also evidence in the record that Perry may pretend to suffer from some of the lesser side effects, such as drooling and impairment of his movement. (R. pp. 0527-9). The benefits of Haldol clearly outweigh any minor side effects. At the same time, many side effects themselves can be controlled by medication. Ironically enough, while Nordyke has criticized the State of Louisiana for allegedly administering Haldol to Perry because of these possible side effects, his own order to abruptly stop all medication subjected Perry to identical side effects. Sudden withdrawal from Haldol may cause a patient to suffer dyskinetic movements indistinguishable from tardive dyskinesia. (See Appendix A, p. 163).

(b) Ford v. Wainwright and Penry v. Lynaugh support the death penalty for mentally ill inmates whose competency is achieved and maintained through medication.

Decisions of this Court support the argument that a death row inmate's mental state - be it mental illness or mental retardation - is not itself dispositive of whether or not the inmate is eligible for execution. Ford illustrates the argument that mental illness per se is not a bar to imposing

the death penalty. If this were true, there would be no need for a de minimus competency standard. A physician's diagnosis alone that the inmate was suffering from a mental illness would automatically commute a death sentence to life imprisonment. Also implicit in Ford is the proposition that a mentally ill condemned prisoner whose competency is achieved and maintained by medicine may be subjected to the death penalty. The only requirement is that the inmate be aware of his impending execution and the reason for it.

This Court also expressly held in Perry that a mentally retarded prisoner may be subjected to the death penalty. Mental retardation, unlike mental illness, is a permanent condition unaffected by medication. A fortiori, a mentally ill death row inmate whose competency is achieved by medication should have no greater rights than a mentally retarded death row inmate, whose mental state is unalterable. As Perry established, a jury should consider mental retardation and the defendant's history of child abuse as mitigating evidence in the sentencing phase. In Perry's case the jury considered and rejected his history of mental illness as a reason to not impose the death penalty. The State's position is that, once a death sentence is validly imposed, evidence of mental illness or mental retardation is irrelevant under Ford unless it affects the de minimus competency standard. The only focus should be whether the Ford competency test is achieved. The Eighth Amendment does not otherwise prohibit execution of a competent prisoner regardless of the inmate's mental status.

(c) Synthetic competency has been recognized as sufficient competency under which a presumptively innocent individual stands trial. Therefore, a convicted murderer whose competency is achieved and maintained through medication should have no greater right.

Louisiana's jurisprudence had recognized that synthetic competency is sufficient competency upon which a defendant may stand trial. See State v. Hampton, 218 So.2d 311 (La. 1969) and State v. Lawrence, 368 So. 2d 699 (La. 1979). Decisions of the Louisiana Supreme Court and the First Circuit Court of Appeals have also approved compelled medication as a condition precedent to release of insanity acquittees. See State v. Collins, 381 So. 2d 449 (La. 1980), and State v. Boulmay, 498 So. 2d 213 (La. App. 1 Cir. 1986). Historically, the Louisiana courts look to the individual's present condition only. How that person's competency is maintained or achieved has no bearing upon whether that person is competent for trial, or eligible for discharge from a commitment. Because Perry's

writ application to the Louisiana Supreme Court was denied, the State of Louisiana can only assume that this analysis applies with equal force, regardless of whether the question is competency for trial, competency for discharge or competency for execution. The State believes that Perry and his counsel would become the most outspoken advocates of the Maudslayi medication if it meant that Perry would be freed from prison; and certainly opposing counsel would be alleging constitutional violations if Perry had been denied medical treatment prior to trial. Opposing counsel's true objection is the death penalty itself, not the Maudslayi treatment or the synthetic competency.

Two members of this Court suggested in Vincent v. Louisiana, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939, reh. den. (1985) (J.J. Brennan, Marshall dissenting) that a mentally ill defendant may have been denied a fair and impartial trial because he was denied the antipsychotic drug Thorazine. Justice Brennan wrote: "There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated." Vincent, 105 S.Ct. at 930. This passage certainly implies that synthetic competency to stand trial is constitutional, indeed even required. If synthetic competency is permissible, and, in view of the Vincent dissent, constitutionally mandated prior to conviction, then it must also be acceptable during a post-conviction proceeding as well.

The State of Louisiana further contends that competency is not contingent upon whether the individual is medicated or not. Competency is competency, regardless of medical treatment. The Fifth Circuit of the U.S. Court of Appeals in U.S. v. Haynes, 589 F.2d 811 (5th Cir. 1979) agreed. In Haynes a former police chief had been convicted of aggravated assault and depriving another of his right to liberty without due process of law, resulting in his death. On appeal, the defendant claimed he had been incompetent to stand trial because his competency had been attained through medication. The Fifth Circuit rejected this claim.

Nonetheless, it is argued that without large doses of Aventyl (an anti-depressant) and Mellaril (an "anti-psychotic" drug), defendant would be incompetent.... The court's inquiry is limited to determining whether defendant is able to assist in his defense and comprehend the nature of the proceedings against him. Once it is determined that he is competent to stand trial, the method of

achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings. U.S. v. Haynes, 589 F. 2d at 823 (5th Cir. 1979). (Emphasis provided).

The State of Louisiana respectfully submits that if a defendant's competency for trial may be constitutionally maintained and achieved by medication, then it is also constitutional that a death row inmate's competency for execution may be maintained and achieved by medication. Justice O'Connor stated in Ford that a death row inmate has fewer constitutional protections post-conviction than what were afforded him prior to conviction. "...[O]nce society, has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Ford, 106 S.Ct. 2612 (O'Connor, J., concurring in part, dissenting in part). If synthetic sanity is acceptable at a time when the Constitution affords its greatest protection, then it must logically follow that synthetic sanity is acceptable when the Constitution's demands have diminished.

2. A death row inmate does not have a "right" to be free from nonconsensual medical treatment that is designed to achieve and maintain competency for execution.

The State has chosen the word "right" to define whatever Perry is claiming for lack of a better word. The first question is: what is the "right"? Is it the "right" to be free from involuntary medication? In the context of a death penalty case, this "right" would have even more implications. Of crucial importance is that the medication is designed to achieve and maintain competency for execution. If this Court were to recognize a death row inmate's "right" to refuse medication, a necessary corollary question would arise: Does a death row inmate have the "right" to induce insanity? A diligent search by the State found no guidance from this Court on whether Perry would have a constitutionally recognized right to be free from a medication that is designed to achieve and maintain competency, and thereby have a "right" to induce

insanity. The source of such a "right" is also unclear in this Court's jurisprudence, on whether it may be a liberty interest or a state-created interest enforceable through the Due Process Clause. Perry has neither identified the authority that supports his claimed liberty interest, nor proven its source from either federal or state law. Instead, the petitioner has asserted his rights in a laundry-list fashion without further explanation. (Pet.'s Brief, p. 23)⁴

The State of Louisiana is not willing to concede that Perry has a protected liberty interest to avoid forcible medication with the antipsychotic drug Haldol. This Court has not declared such a right. In fact, in Mills v. Rogers 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982), Justice Powell expressly reserved the ability to address the question of whether such a "right" does exist under the federal constitution itself. The Mills case was a class action suit by mental patients who were claiming, among other things, that the forcible administration of antipsychotic drugs violated their rights under the federal constitution. The parties involved accepted as a given that this protected liberty interest existed under the federal constitution. In dismissing such a "right", Justice Powell stated:

As do the parties, we assume for purposes of this discussion that involuntarily committed mental patients do retain liberty interests protected directly by the Constitution...and that these interests are implicated by the involuntary administration of antipsychotic drugs. Only 'assuming' the existence of such interests, we of course intimate no view as to the weight of such interests in comparison with possible countervailing state interests. Mills 102 S.Ct. at 2448. (Footnote No. 16; citation omitted).

4. Because the petitioner's counsel in their brief to this Court discussed the Eighth and Fourteenth Amendment arguments in a illogical manner, the State of Louisiana was unable to distinguish exactly what "rights" the petitioner was claiming were violated, and from what source those "rights" emanated. Therefore, the State has chosen to address issues it believes are underlying this petition, and then address the petitioner's concerns in relation to those issues. The State will not re-address issues based on state law. Those issues including the standard of competency for execution in Louisiana are briefed in Appendix A. The Louisiana Supreme Court in State v. Perry, So.2d ____ (La. 1989) Nos. 88-KD-2239 and 89-KA-0159, (May 12, 1989; reconsideration denied, State v. Perry, So.2d ____ (La. 1989) (June 16, 1989) ruled against the petitioner.

Until directed otherwise, the State is hesitant to recognize a "right" that has no textual source and has not been identified by this Court as emanating from the Constitution itself. Therefore, there is no presumption in the case at bar that such a "right" exists.

(a) Assuming arguendo that a death row inmate does have a constitutionally protected liberty interest, that interest was extinguished upon the imposition of a valid death sentence.

If this Court should find that such a protected liberty interest does exist, the State responds that a death row inmate's interest in being free from a medication that is designed to achieve and maintain competency for execution was extinguished upon the imposition of a sentence of death. Such an extinguishment of a liberty interest is understood in many contexts. For instance, a defendant loses his liberty interest to be free from confinement once a jury returns a verdict of guilty as charged. In a death penalty case, the condemned inmate further loses his right to life once a legally imposed sentence of death is declared. A death row inmate's status alone mandates special consideration not found in any other context. For instance, the liberty interest of an involuntarily committed individual who has committed no crime cannot be on par with an individual who is responsible for five brutal killings. We must not forget that the medication is aimed at achieving and maintaining competency for carrying out the jury's decision. Society itself demands only one conclusion. Any liberty interest Perry may have had was extinguished when the jury rendered its sentence of death.

This Court in Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532 (1976), 49 L.Ed.2d 451 recognized that a prisoner who was validly convicted and sentenced does not retain a liberty interest to remain in any one particular prison. On the contrary, the state has the authority to transfer the prisoner to any of its prisons. The court stated: "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in ANY of its prisons." Meachum 96 S.Ct. at 2538, (Court's emphasis).

Perry was placed on death row with the expectation that some day, after he had exhausted all avenues of appeal, the State of Louisiana would execute him. Perry's expectation, therefore, is opposite to that of the inmate in Vitek v. Jones,

445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980). Justice White, in writing for the majority, had held that the involuntary transfer of an inmate from a prison to a mental hospital did require procedural protections under the due process clause, based upon a liberty interest created by a Nebraska statute that had allowed for such a transfer. The Court's reasoning focused on the fact that the prisoner could not have reasonably anticipated confinement in a mental hospital at the time he was convicted and sentenced. In contrast, Perry knew that the State of Louisiana would do everything within its power to carry out the legally imposed sentence of death. Medication to achieve and maintain competency for execution is within the range of expectations likely to confront any condemned inmate whose mental illness had been judicially established. Perry himself has raised the shield of mental incompetency as a reason not to carry out a lawfully imposed sentence. Do we now let him turn that shield into a sword by refusing medication in an attempt to thwart society's legitimate interest in retribution? Implicit in the death row inmate's questioning of his competency is the State's authority to treat him if necessary to achieve or maintain competency for execution. Medication of a mentally ill inmate is reasonably expected. In direct contrast to Perry's case, the inmate in Vitek could not have expected that his prison term would include involuntary transfer to a mental hospital. For Perry, it is within the range of conditions of his conviction and sentence that he submit himself to treatment so as to maintain his competency to be executed.

The State of Louisiana also maintains that nonconsensual medication to achieve and maintain competency is within the legitimate limits of this State's authority to carry out Perry's sentence. This Court in Montanye v. Haymes 427 U.S. 236, 96 S.Ct. 2543 (1976), 49 L.Ed.2d 466 stated: "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montanye 96 S.Ct. at 2547. The medication of Perry is a necessary concomitant to carrying out his sentence of death. Therefore, any liberty interest to refuse reasonable and nonarbitrary medical treatment was extinguished contemporaneously when Perry's liberty interest to life was extinguished - that is, when Perry's sentence of death was imposed.

The State does recognize that Perry may still retain a residual liberty interest. While a conviction and subsequent

death sentence greatly diminish a death row inmate's constitutional rights, he does not forfeit all such protections. Wolff v. McDonnell 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) recognized that "the touchstone of due process is protection of the individual against arbitrary action of government." The State concedes that Perry may have a liberty interest to avoid experimental drugs or extreme medical procedures that are outside the mainstream of professional medical practice. Maudol is not such a drug; it is a well recognized, medically acceptable treatment for anyone suffering from schizoaffective disorder. The nonconsensual administration of Maudol to Perry is an appropriate and reasonably anticipated measure by the State of Louisiana to assure his competency for execution.

(b) In the alternative that a condemned inmate does retain a liberty interest to refuse medication despite his conviction, the State has an overriding interest to ensure that his death sentence is implemented.

Assuming the condemned inmate has a liberty interest under the Fourteenth Amendment to refuse mental health treatment and thereby induce insanity, the State has an overriding interest to seek retribution under a validly imposed death sentence. In Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) this Court recognized a balancing of the state's legitimate security interests against the inmate's privacy interests when it held that the Fourth and Fifth Amendments did not prohibit the visual body-cavity searches of pre-trial detainees following contact with outside visitors. The Court found that the search was a reasonable response to a legitimate security interest.

In this case, the State of Louisiana is asserting that its legitimate interest of retribution outweighs any retained liberty interest by the condemned inmate to refuse medication that is designed to achieve and maintain competency for execution. If necessary, the state should have the authority to forcibly medicate Perry so that the execution may proceed. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976) this Court reaffirmed that the Eighth Amendment is subject to a flexible interpretation that "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 598 2 L.Ed.2d 630 (1958). State legislatures by statute have approved forcibly medicating inmates if necessary. The jurisprudence of this Court indicates that only excessive punishment, either because it involves the

unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime, is prohibited under the Eighth Amendment. Execution while the inmate is medicated with Maudol is neither excessive nor disproportionate. The State of Louisiana contends that Perry had not proven that his execution effectuated through the nonconsensual treatment with Maudol is a sanction that is imposed without any penological justification and "results in the gratuitous infliction of suffering." Gregg 96 S.Ct. at 2929. Perry's medical treatment is not being inflicted in an arbitrary or capricious manner; it is the same treatment afforded anyone with schizoaffective disorder. Perry just happens to also be on death row. To allow Perry a constitutional right to refuse medical treatment that is designed to achieve and maintain competency for execution is to deny the people of the State of Louisiana their legitimate right to retribution. "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." Furman v. Georgia, 408 U.S. 238, 308, 92 S.Ct. 2726, 2761, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

The Ford opinion itself recognized the state's interest in retribution, thereby requiring that the condemned inmate know of his impending death and the reason for it. Otherwise, if the inmate lacks this capacity, his execution as to him is meaningless. Justice Powell called the state's interest in carrying out a validly imposed death sentence "a substantial and legitimate interest in taking petitioner's life as punishment for his crime." Ford 106 S.Ct. at 2610 (Powell, J., concurring).

Other factors in the balancing of interests prove that the benefits of the Maudol medication outweigh any possible side effects. There is no evidence in the record that Perry has suffered any side effects. It is also important to note that a symptom of the illness is to refuse medication. Medication is also required as a starting point before any behavior modification therapy may be administered. The only adverse impact that Perry has alluded to is the possibility of contracting tardive dyskinesia five years from now, and then the chances of that occurring are, at worst, one in four.

Opposing counsel in their brief to this Court conceded that an incompetent inmate could be forcibly medicated by the state. Their brief to this court repetitiously recites that

Perry is insane. The record, however, fails to prove that Perry has ever been adjudged insane, either at the commission of the crime or at trial. Assuming arguendo that Perry was and is insane, his counsel then asserts: "Non-consensual medication is permitted only upon a finding of incompetence." (See Pet.'s Brief, p. 11). This assertion leads the State to conclude that our opposing counsel has conceded to the state its authority to medicate Perry against his will "upon a finding of incompetence."

3. The State of Louisiana has a duty to provide medical treatment to all prisoners including mentally ill death row inmates.

Beginning with the premise that Perry is insane, as his counsel so adamantly argues, Perry's lawyers then also posit that Perry is competent to refuse needed medical treatment. In other words, an "insane" murderer knows treatment with Haldol is not in his best interest. The lack of logic of this argument is self-evident. However, even if one ignores this nonsensical line of reasoning, opposing counsel still has yet to address a very important argument that supports nonconsensual medical treatment - that is, the affirmative duty placed upon the State of Louisiana to provide adequate medical care to its incarcerated inmates.

In Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), this Honorable Court recognized a state's legitimate interest under its parens patriae power to provide adequate medical care for its mentally ill citizens. At stake also was the state's police power to protect the community at large from an individual who was a danger to others. Inside the walls of Louisiana State Penitentiary at Angola, there can be little doubt that an unmedicated Michael Perry would be a danger to other inmates and the institution's employees, as well as a danger to himself. One need only look at the numerous suicide watches called at Angola to protect Perry from himself and others.

Putting these concerns aside, even if this Court were to grant Perry the authority to refuse all antipsychotic medication, the State of Louisiana would be placed in a Catch-22 situation. The State could not forcibly medicate Perry, while at the same time, the Eighth Amendment under Woodall v. Foti, 648 F.2d 268 (5th Cir. 1981) requires a state to provide adequate psychiatric care to incarcerated inmates. If an inmate proves that the penitentiary has shown a

"deliberate indifference" to his psychiatric needs, then the inmate has stated a cause of action under 42 U.S.C.A. § 1983. The Haldol treatment Perry has received is a necessary and reasonable psychiatric treatment required for his mental health and well-being. It would indeed be anomalous for this Court to hold that this very treatment required by the Eighth Amendment would at the same time violate that same amendment.

In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) this Court held that deliberate indifference to an inmate's medical needs was cruel and unusual punishment under the Eighth Amendment. Would it not indeed be cruel and unusual punishment for the State of Louisiana to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations? Would this mental torture be the infliction of pain without any legitimate penological purpose? The State of Louisiana posits that such indifference would violate Perry's rights under the Eighth Amendment. Therefore, this Court must recognize Louisiana's parens patriae power to administer, forcibly if necessary, antipsychotic medication to a mentally ill inmate. As Blackstone once said, the sovereign or his representative is "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 255, 92 S.Ct. 885, 888, 31 L.Ed.2d 184 (1972), citing from 3 W. Blackstone, Commentaries 47. Based on its parens patriae power, Louisiana has the power to do what is best for its citizens, including mentally ill death row inmates.

4. Federal and state statutory laws support the State of Louisiana's position that a finding of incompetency mandates the necessity of medical treatment.

The State of Louisiana will fully discuss in its argument on Issue II, infra, the reasons that support the State's position that the trial court's finding of competency, but competent only while medicated, implied the necessity of medical treatment, either with or without Perry's consent. At this point it suffices to state that both federal and Louisiana statutory law subsumes the necessity of medical treatment within a finding of mental incompetency.

Under 18 U.S.C. § 4245, once a pre-trial detainee is declared incompetent to stand trial, the individual is ordered to the custody of the U.S. Attorney General for treatment. In pertinent part, the statute provides:

"If, after the hearing, the court finds by a preponderance of the evidence that the person is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the person to the custody of the Attorney General. The Attorney General SHALL HOSPITALIZE THE PERSON FOR TREATMENT in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of the sentence of imprisonment, whichever occurs earlier." (Emphasis provided.)

This federal statute is based on the premise that once an individual is judicially determined to be incompetent to stand trial, the individual is then committed to a suitable facility for care or treatment. Under 18 § 4243 an insanity acquittee may be conditionally released on an order that the individual comply with a prescribed regimen of medical care.

As argued extensively in our brief to the Louisiana Supreme Court (see Appendix A, pp. 116-169), the State's position is that Louisiana's statutory law subsumes the necessity of medical treatment within a finding of incompetency. Simply stated, when Perry raised the issue of his competency to be executed, he implicitly authorized the State to medicate him if necessary to achieve and maintain competency. While Louisiana has no statutory laws governing competency to be executed, all other similar statutes dealing with competency to stand trial, civil committees, inmates who are found to be a danger to themselves or others, insanity acquittees, and probationers or parolees, imply an authorization to administer medical treatment once incompetency has been established. For example, La. C.Cr.P. art. 648 provides, in pertinent part, that the court "shall commit the defendant...for...treatment, as long as the lack of capacity continues." If a Louisiana court can constitutionally order a pre-trial detainee under art. 648 to submit to medical treatment once incompetency is established, the State must certainly have the same power over a death row inmate, who has invoked the shield of incompetency as a means to stay his execution. Furthermore, La. R.S. 28:55(1) provides in pertinent part regarding involuntarily committed persons that "[a] patient confined to a treatment facility by judicial commitment may receive medication and treatment without his consent...." It would be anomalous if a civil committee can be treated without his consent and a death row inmate cannot be so treated.

5. Petitioner has failed in his burden of proof to show any national consensus against forcibly medicating a condemned prisoner.

In determining the "evolving standards of decency that mark the progress of a maturing society," as announced in Trop v. Dulles, supra, this Court has looked not to the individual standards of decency held by each justice, but to society's standards of decency, especially those standards reflected in the statutes enacted by society's elected representatives. This practice of referring to the laws of the fifty states was followed by this Court in its major death penalty cases including Ford, Penry and Stanford v. Kentucky, ___ U.S. ___, 109 S.Ct. 2969, ___ L.Ed.2d ___ (1989). The State of Louisiana respectfully submits that the petitioner has not established a national consensus against forcibly medicating a death row inmate in order to achieve and maintain competency for execution. Unless Perry does so, his claim that nonconsensual treatment violates his Eighth Amendment right lacks merit.

Finally, Perry has also failed to point to any conflict in the district courts as to forcibly medicating either involuntarily detained civil committees or pre-trial detainees. In U.S. v. Charters, 863 F.2d 302 (4th Cir. 1988), the Court of Appeals, on rehearing, held that a pre-trial detainee who had been found incompetent to stand trial could be forcibly medicated, as long as the government's action was not arbitrary or capricious, and as long as professional medical judgment was exercised and subject to judicial review. The Third Circuit of the U.S. Court of Appeals in Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983) held that a civil committee who was involuntarily placed in a mental facility could be forcibly medicated, provided accepted professional judgment was exercised and provided that the treatment regimen was one accepted within the medical community. The State of Louisiana argues that in the context of a death penalty case, the state's countervailing interest in retribution should override any interest Perry may retain in refusing antipsychotic medication. The medication is administered to Perry only under the exercise of professional medical judgment. Because the petitioner can point to no conflict in the district courts, and because the petitioner does not contend that any Louisiana statute as applied to him is unconstitutional, he has not supported his contention that a writ of certiorari should be granted.

ISSUE II.

Assuming that: (1) competency to be executed may be medically achieved and maintained through nonconsensual, medically supervised treatment; and (2) the condemned inmate has a remaining constitutionally protected liberty interest, what procedures are required by the Fourteenth Amendment under Ford v. Wainwright prior to such treatment?

A. Pretext

The petitioner asserts that he is (1) insane and/or incompetent; (2) that he has a right to refuse medical treatment designed to achieve his competency to be executed; and (3) that the trial court violated his procedural due process rights in the conduct of the hearing to determine competency to be executed and the subsequent order to submit to medical treatment.

Several matters must be addressed prior to beginning an analysis of these assertions. The State notes that the above issues are outlined by the undersigned writer. This was done because the inmate's several lawyers have failed to coherently delineate and analyze the issues. It was left to the respondent to discern their complaints from a confused, inarticulate petition for certiorari.

Second, it is important to recognize that this inmate has never been declared either insane or incompetent prior to or during the trial of this horrendous crime. Although inmate's counsel states in his third sentence of the brief that Perry "was found incompetent to proceed to trial several times", (see Pet.'s Brief, p. 4), such contention is simply incorrect. There is absolutely no such conclusion anywhere in the trial record. Such a misstatement is an example of inmate counsel's petition, which is replete with mischaracterizations.

Third, the claimed right to refuse medical treatment (designed to achieve competency to be executed) cannot be an absolute, categorical precept. If it were, then we would be giving the death row inmate the universal authority to choose a life of madness over a valid sentence of death. The right to refuse medical treatment must necessarily be a flexible right which is hinged on several variables. As stated in Argument I

supra, the inmate's right to refuse medical treatment is either extinguished upon rendition of a valid sentence of death, or, it is a right which must be weighed against state interests on a case-by-case basis.

Fourth, it is pertinent that this death row inmate has never been compelled to accept undesired medical treatment. Although inmate's counsel would have this Court believe that he was medicated in violation of a Louisiana Supreme Court stay order, (See Pet.'s Brief, p. 21, Note 12), this contention is erroneous. In short, this same contention was presented to the Louisiana Supreme Court and its answer was a writ denial. ____ So.2d ____ (La. 1989) (Nos. 88-KD-2239 and 89-KA-0159) (May 12, 1989) reconsideration denied, ____ So.2d ____, (La. 1989)(June 16, 1989). More important, is the fact that this inmate can point to no evidence in the record which buttresses his argument that he has been subjected to unwanted medical treatment. The testimony of several physicians demonstrates that Perry improves with medication and occasionally requests that he receive treatment. Thus, it appears that the matter now under consideration does not focus on an alleged deprivation of an assumed right to refuse medical treatment, but focuses upon an anticipated deprivation of the assumed right to refuse medical treatment. The anticipated deprivation to supposedly arise from the trial court's order. The trial court determined Perry to be competent when medicated and consequently ordered the Department of Corrections medical staff to provide nonconsensual medical treatment in order to maintain his competency to be executed. The condemned inmate is now applying for certiorari based upon treatment he anticipates occurring in the future.

This opposition to petition for certiorari rests upon several givens and assumptions. Given is the fact that the State of Louisiana has a death penalty for first degree murder. See LSA-R.S. 14:30. Also given is the fact that Ford v. Wainwright, supra, requires an inmate to be competent in order to be executed.

Assumed, is the proposition that medically achieved and maintained competence is sufficient to satisfy the Eighth Amendment right enunciated in Ford. Also assumed is the condemned inmate's proposition that he has a protected liberty interest in refusing medical treatment designed to achieve

competency to be executed.⁵

In view of the above givens and assumptions, the remaining questions are:

(1) Was the trial court's determination of incompetency made in accord with procedural due process as set forth in Ford v. Wainwright?

and

(2) Did the trial court err in ordering treatment (to achieve competency) premised upon a determination of incompetency. Restated, does procedural due process require a second adversarial, adjudicative determination prior to treatment if the inmate refuses treatment?

B. Argument

The proceedings below conclusively demonstrate that the death row inmate was correctly ordered to receive nonconsensual, medically supervised treatment designed to achieve competency to be executed; all in accord with procedural due process as mandated by the Fourteenth Amendment through Ford v. Wainwright.

1. The trial court's determination of incompetency (i.e., competency achieved through the use of antipsychotic medication) was made in accord with procedural due process as set forth in Ford v. Wainwright.

The trial court ruled as follows:

For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or

5. Implicit in the claim of, or recognition of, any liberty interest to refuse treatment is the apparent negating of the inmate's initial claim that mental illness per se is a bar to execution. This argument is apparently unacceptable in view of Penry v. Lynaugh. In Penry, this Honorable Court rejected the proposition that retardation per se, pursuant to the Eighth Amendment, precludes the imposition of the death penalty.

(2) An opportunity to challenge and/or impeach the expert's opinions on the ultimate question at issue (J. Marshall's plurality);

and (3) The guarantee of an impartial officer to receive argument and evidence from the prisoner, including expert psychiatric evidence that may differ from the State's own psychiatric examination. (J. Marshall's plurality and J. Powell's concurrence).

The State of Louisiana submits that Perry was afforded procedural due process in excess of constitutional requirements.

(b) The procedural due process which in fact accompanied the trial court's determination of Perry's competency to be executed exceeded de minimus federal constitutional standards.

The condemned inmate was afforded a vast array of rights and privileges in the course of determining his competency to be executed. The procedural protections afforded to him exceeded even the most strident prerequisites of Ford. Basically, the trial court afforded to the inmate:

(i) The privilege of assistance of counsel;

(ii) The privilege of compulsory process;

(iii) The right to present evidence on his behalf;

(iv) The opportunity to choose half of the members of the sanity commission which evaluated him;

(v) The right to challenge and impeach the expert's opinions on the ultimate issue of competency to be executed;

(vi) The privilege to participate in an adversarial hearing;

(vii) The privilege to testify as a witness and be videotaped for posterity;

(viii) The right to an independent and neutral decisionmaker outside of the executive branch of government;

(ix) The privilege of judicial review.

For a more detailed explanation of each of these rights and privileges, refer to the State's Opposition to Petition for Supervisory Writs, Louisiana Supreme Court, March 30, 1989. (Attached hereto as Appendix A). Specifically, refer to Section XI.

The only remaining question is whether some error occurred during the hearing process.

(c) The trial court's conduct of the competency hearing was impeccable, and certainly manifested no error of constitutional dimensions.

The inmate's petition for certiorari offers a smorgasbord of alleged trial court errors. (See Pet.'s Brief, pp. 30-35). All available "buzzwords" were shoveled to this Honorable Court. The complaints lack merit. Each of the current allegations was addressed and rebutted in the State's brief to the Louisiana Supreme Court (See App. A). Specifically, Sections XI(B)-(E), pp. 173-212, respond to and disprove the current arguments that the trial court erred during the conduct of the competency hearing.

Petitioner inmate now proposes that the trial court erred in accepting three updates on the inmate's medical condition. He characterizes the reports (which were filed in the trial record) as "ex parte Communication with the State." (See Pet.'s Brief, p. 30). Such characterization is inaccurate in light of the fact that the reports were offered by amicus curiae, who was custodian of the inmate, and were contemporaneously filed in the trial record for all parties to examine and act upon.

The State respectfully suggests that the trial court's receipt of continuing medical updates of the condemned inmate was not error. In fact, we suggest that it was highly pertinent and relevant material, without which, the factfinder may have made an ill-informed judgment concerning the inmate's fate. An ill-informed judgment can not be countenanced by any party or court. See Ford, supra, at 2606 and Ford, at 2611 (Powell, J., concurring).

Furthermore, we believe that there is an affirmative duty on the part of custodians who are entrusted with the treatment of incompetent inmates to periodically update the committing court. For example, in United States v. Curry, 410

F.2d 1372 (4 Cir. 1969) the Fourth Circuit stated that there "should be a requirement that the custodian report to the court on a prescribed schedule the mental health of his ward." at p. 1374. Also, in In re Harmon, 425 F.2d 916 (1 Cir. 1970) the First Circuit set out guidelines for psychiatrists who are responsible for the treatment of pre-trial detainees determined to be incompetent to stand trial. The Court stated "if the accused is committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246, the district court should require frequent reports on the accused's mental condition at stated intervals." at p. 918. Also see United States v. Geelan, 520 F.2d 585 (9 Cir. 1975).

Based on Ford's dictate that competency decisions be premised upon all available evidence; and upon Justice Powell's concurrence "that ordinary adversarial proceed[ings] ... are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity" -- Ford, supra, at p. 2611 -- as well as the aforecited circuit court's expectation of medical updates by custodians; we suggest that the trial court committed no violation of procedural due process guaranteed to the condemned inmate.

To summarize, the trial court's conduct of the competency proceedings exceeded the procedural due process required by this Honorable Court in Ford. Moreover, the trial court committed no error of constitutional dimension by accepting medical updates on the condition of Michael Owen Perry. Therefore, petitioner's application for certiorari should be denied.

2. The trial court correctly ordered treatment of the condemned inmate based upon the determination of incompetency to be executed (i.e., competent only when maintained on medication.)

It is important to immediately recall that the trial court found that Perry was "competent for executiononly while maintained on psychotropic medication in the form of Haldol." (R. p. 41). From this determination, we respectfully suggest that Perry may be incompetent when treatment is either denied or refused. The trial court's conclusion that treatment is necessary to maintain competence equates to a determination that Perry is incompetent without treatment. We believe that the trial court acted correctly when he ordered the Department of Corrections medical staff to treat Perry to maintain competency for execution.

The condemned inmate seems to argue that the trial court acted improvidently by ordering treatment without an additional adversarial, adjudicative determination on the subject of Perry's incompetency to make treatment decisions. This contention is misplaced.

There are several facts which are relevant to a determination of whether due process requires multiple adversarial, adjudicative proceedings. First, we must recall that the trial court concluded, as a matter of law, that Perry is competent only when medicated. Second, it is abundantly clear that he is not competent for execution, according to Ford, when not properly administered antipsychotic medication. Third, the doctors and the trial court agree that Perry is in need of medication because of his condition. Fourth, all doctors agree that Perry improves, to the level of competency to be executed, with the administration of antipsychotic medication. Fifth, the administration of antipsychotic medication is an approved and recommended treatment regimen for the diagnosed condition of schizoaffective disorder. And sixth, Perry has asserted, claimed and carried the burden of proving his (A) incompetency to be executed when unmedicated and (B) his need for treatment.

The combination of factors listed above mandates a finding that the trial court correctly ordered treatment of the condemned inmate premised upon a single finding of incompetency to be executed without treatment.

(a) This Court's decision in Vitek v. Jones implicitly recognizes and authorizes nonconsensual medical treatment upon a due process determination that treatment is necessary.

In Vitek v. Jones, 445 U.S. 80, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) an inmate brought an action challenging the constitutionality, on procedural due process grounds, of a Nebraska statute which allowed the Department of Correctional Services to transfer any prisoner to a mental hospital upon a physician's finding that the prisoner is suffering from a mental disorder. The issue, according to Justice White, was whether the involuntary transfer of a Nebraska state prisoner to a mental hospital for treatment implicates a liberty interest that is protected by the due process clause. This Court held that Jones' transfer to a mental hospital for the purpose of psychiatric treatment implicated a liberty interest protected by the Due Process Clause. Vitek, 100 S.Ct. at 1264. The apparent rationale for this Court's conclusions of a liberty interest insured by procedural protections was "the

stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illnessIbid; emphasis provided.) Further, this Court identified the prisoner's interest as "not being arbitrarily classified as mentally ill and subjected to unwelcome treatment...." Vitek, 100 S.Ct., at 1265. (Emphasis provided).

The above passages reveal this Court's finding that treatment necessarily follows a transfer to the mental hospital. Such finding is quite relevant to the current issue. The trial court below determined that treatment was authorized after a finding that treatment was necessary. In Vitek, this Court approved of a similar analysis. That is, once Nebraska determined the need for transfer (i.e., that the prisoner suffered from a mental defect which required treatment), then the authority to treat was available to the hospital officials. Implicit is that the hospital officials did not have to return to court for an additional adversarial, adjudicative proceeding to determine if the prisoner is competent to make decisions regarding his treatment. The determination of need for treatment in Jones' case was the authority for hospital officials to subject him to "involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...." Vitek, 100 S.Ct. at 1264. The State suggests that the trial court's conclusion of need for treatment is sufficient authority for the Department of Corrections medical staff to involuntarily administer antipsychotic medication to the condemned inmate. There is no need to conduct an additional hearing on the question of competency to refuse medication.

Recognition of the notion that an inmate is entitled to a single hearing prior to initiation of involuntary treatment is found in Baugh v. Woodard, 808 F.2d 333 (4 Cir. 1987). In Baugh, the Fourth Circuit rejected a suggestion that a due process required hearing must occur prior to the inmate's physical transfer to a mental health unit and before involuntary treatment began. Baugh, 808 F.2d at 337.

In Stensvad v. Reivitz, 601 F.Supp. 128 (W.D. Wis. 1985) an involuntarily committed mental patient brought an action challenging nonconsensual drug treatment. At issue was whether a Wisconsin statute, which provided for no right to refuse drug treatment on behalf of involuntarily committed mental patients, was unconstitutional. The Court rejected the

constitutional challenge stating "that an involuntary commitment is a finding of incompetency with respect to treatment decisions. Nonconsensual treatment is what involuntary commitment is all about." Stensvad, 601 F.Supp. at 131. From Stensvad, it appears that Vitek has been interpreted to mean that a decision to commit amounts to the authority to treat despite the expressed desires of an involuntarily committed mental patient. Further, if such an interpretation of Vitek can apply to a mental patient, we suggest it applies with even greater force to a death row inmate.

In Lappe v. Loeffelholz, 815 F.2d 1173 (8 Cir. 1987) an inmate brought a 1983 action against prison officials to challenge the forcible injection of medication without a hearing as a violation of due process. At issue was whether the prison officials were entitled to qualified immunity on the basis that no right to refuse forcible medication had been "clearly established" by Vitek jurisprudence. "Lappe argue[d] that Vitek [citation omitted] clearly established that the fourteenth amendment entitled him to another hearing before he could be subjected to forced behavior modification." (Emphasis provided.) Lappe, 815 F.2d at 1176. The court rejected Lappe's contention. The court reasoned that "[O]nce Lappe was given a full hearing on the issues of his involuntary commitment and need for medication, it is not clear that the forced administration of Haldol deprived him of the protections established in Vitek." Ibid. The court also stated that "Lappe's liberty interest in not being classified and treated as a mentally ill individual was extinguished when he had his first hearing according to the procedures established in Vitek." Lappe, 815 F.2d at 1177.

Like Lappe, Perry received a trial court determination of his incompetency and corollary need for treatment. Like Lappe, Perry has received all necessary procedural due process prior to a nonconsensual, medically supervised administration of antipsychotic medication. Vitek and its progeny simply do not require an additional adversarial, adjudicative hearing prior to the forcible administration of medication which will maintain competency to be executed. Simply put, a single hearing and finding of incompetency is sufficient to authorize treatment by medical officials.

This position is supported by Dautremont v. Broadlawns Hospital, 827 F.2d 291 (8 Cir. 1987). In Dautremont, a former psychiatric patient brought a 1983 action against a hospital and physicians for deprivation of due process arising out of the involuntary administration of psychotherapeutic drugs. The court rejected the claim. Most significant to this case is

that the court accepted an Oklahoma commitment hearing as satisfaction of Iowa's authority to forcibly treat the patient. The court stated that "the pre-Oklahoma hospitalization hearing provided Dautremont all the process he was due in these circumstances." Dautremont, 827 F.2d at 197. This conclusion, of no need for a second hearing by a different state is indeed remarkable. It forcefully demonstrates that a second hearing would be duplicitious and fail to meaningfully advance any interest protected by the due process clause.

The State of Louisiana suggests that Dautremont is authority for the trial court's conduct of Perry's proceedings. The trial court's conclusions of competency only when medicated; Perry's need of the medication; the fact that Perry improves with the medication; the determination that the medication is an approved form of treatment for the illness; and the recognition that Perry proved his own need for treatment all support our contention that the trial court correctly ordered involuntary treatment.

(b) Should there be a due process requirement of an additional authorization to treat the condemned inmate; then Youngberg v. Romeo and U.S. v. Charters dictate that such decision is left to the professional judgment of the appropriate medical personnel at the custodial institution.

Alternatively, if this Honorable Court determines that: (1) a finding of incompetency to be executed does not amount to authority to involuntarily treat the condemned inmate; and (2) that the inmate retains a residual liberty interest in deciding whether to accept medical treatment designed to maintain competency; then the State suggests that the decision to involuntarily treat be left to the "professional judgment" of supervising doctors rather than an additional adversarial adjudicative proceeding.

In Youngberg v. Romeo, 457 U.S. 305, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) this Honorable Court considered several questions, among them what was the proper standard for determining whether a state has adequately protected the rights of the involuntarily committed mentally retarded. If we assume that (1) inmate Perry's right to refuse medical treatment exists despite his conviction and sentence, and (2) that he retains a liberty interest as great as Romeo's; then we must determine how Perry's interests are to be judged and by whom. We suggest that Youngberg answers this question. This Court stated in Youngberg that "the decision, if made by a professional, [footnote omitted] is presumptively valid,

liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. [footnote omitted]" Youngberg, 102 S.Ct. at 2462.

The Youngberg court seems to suggest that Perry's right to refuse medical treatment (designed to achieve his competency) can be assessed by professionals in the course of their duties rather than by an additional adversarial adjudicative proceeding.

In United States v. Charters, 863 F.2d 302 (4 Cir. 1988) (rehearing en banc), cert. applied for ____ U.S. ____, 44 Cr.L. 4178 (Feb. 14, 1989), an involuntarily committed pre-trial psychiatric patient appealed a district court order permitting the nonconsensual administration of antipsychotic medication.⁶ The Charters issue may be restated as follows: Does the nonconsensual administration of antipsychotic medication, without a judicial determination that the patient is incapable of making his own medical decisions, unconstitutionally impinge upon protected liberty interests? The court, on rehearing, essentially concluded that the base-line decision to medicate should be made by appropriate medical personnel of the custodial institution, with judicial review available to guard against arbitrary governmental action.

The court stated "there is no requirement that, as a matter of due process, every medication decision by responsible medical professionals be submitted by the government for prior judicial approval before proceeding to carry it out." Charters, 863 F.2d at 314.

Further, the court rejected the proposition that an adjudicated incompetent (for commitment purposes) can simultaneously maintain his competence to decide his own "best interests in receiving or declining medication." Charters, 863 F.2d at 310.

6. The Fourth Circuit presumed that a legally confined person nonetheless retained an interest in refusing antipsychotic medication. In Charters, the government did not, as Louisiana suggests in II(A) above, assert that the supposed retained interests were displaced as "incidental to the basis for legal institutionalization." Charters, 863 F.2d at 305.

Counsel for the condemned inmate has suggested to both the trial court and the Louisiana Supreme Court that Perry is entitled to an additional adversarial, adjudicative proceeding to determine his competence to decline medical treatment. He has also suggested that it is incumbent upon the trial court to make a "substituted judgment" of Perry's "best interests" if it is determined that Perry is incompetent to refuse treatment.

The State of Louisiana contends that such requirements are unnecessary and unworkable. Without offering multiple rhetorical questions to demonstrate the folly in such an approach, let it be said that few sane death row inmates will choose death over life.

Prior to Charters, United States District Courts have recognized that it is the duty of doctors, not courts, to decide whether an inmate is competent to refuse medication. See U.S. v. Bryant, 670 F.Supp. 840 (D. Minn. 1987); and U.S. v. Leatherman, 580 F.Supp. 977 (D.D.C. 1983).

It is not a new premise to suggest that confined persons are not entitled to an additional court hearing on the question of forcible medication. We likewise suggest that, if Perry even retains any protected interests after his sentence of death and after a due process hearing on his competency to be executed, an additional adversarial, adjudicative proceeding is not required before forcibly medicating him.

CONCLUSION

Petitioner's writ of certiorari should be denied. First, there is no evidence in the record that the petitioner has been forcibly medicated with antipsychotic drugs. Second, the petitioner has also failed to carry his burden of proving a national consensus against forcibly medicating a condemned inmate. Finally, the petitioner's counsel has neither pointed to a conflict within the district courts, nor claimed Louisiana law as applied to the petitioner is unconstitutional. Therefore, the petitioner has stated no ground upon which certiorari could be granted. The State of Louisiana therefore entreats this Court to deny the petitioner's application for certiorari.

EAST BATON ROUGE PARISH
STATE OF LOUISIANA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Original Brief on Behalf of the State of Louisiana in Opposition to a Writ Application to the United States Supreme Court has been forwarded to Keith Nordyke, 427 Mayflower Street, Baton Rouge, La. 70802; Joseph Giarrusso, Jr., 643 Magazine Street, New Orleans, La. 70130; Annette Viator, Staff Attorney, La. Dept. of Corrections, P.O. Box 94304, Baton Rouge, La. 70804; and the Honorable L. J. Hymel, Jr., Judge, by placing same in the U. S. Mails, postage prepaid.

Baton Rouge, Louisiana, this 26th day
of September, 1989.

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BY: Rene Salomon
RENE SALOMON
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me, Notary Public,
this 26 day of September, 1989.

Henri R. Jensen
NOTARY PUBLIC

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No. 89-5120

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

MICHAEL OWEN PERRY

Petitioner,

v.

LOUISIANA

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Louisiana

JOINT APPENDIX

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Certiorari Granted March 5, 1969

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CHRONOLOGICAL LIST OF EVENTS

September 2, 1983	Indictment for five (5) counts of first degree murder.
October 31, 1985	Conviction of five (5) counts of first degree murder.
November 24, 1986	Opinion of Louisiana Supreme Court on direct appeal.
March 12, 1987	Denial of rehearing by Louisiana Supreme Court.
October 5, 1987	Denial of application for writ of certiorari by United States Supreme Court.
January 14, 1988	Trial Court orders hearing on competency to be executed.
August 29, 1988	Stay of forcible medication by Louisiana Supreme Court.
October 21, 1988	Trial Court's ruling on competency to be executed.
May 12, 1989	Denial of writ of certiorari and appeal by Louisiana Supreme Court. Stay of forcible medication lifted.
June 16, 1989	Denial of Rehearing by Louisiana Supreme Court.

State of Louisiana v. Michael Owen Perry
502 So.2d 543 (La. 1986)

Supreme Court of Louisiana

STATE of Louisiana

v.

Michael Owen PERRY.

No. 86 KA 0460.

Nov. 24, 1986.

Rehearing Denied March 12, 1987.

COLE, Justice*

Michael Owen Perry was indicted on five counts of first degree murder, in violation of La. R.S. 14:30. After deliberation during the guilt phase of his trial, the twelve person jury unanimously concluded defendant was guilty as charged on all five counts. Following the presentation of evidence during the sentencing portion of the trial, the jury unanimously recommended defendant be sentenced to death on each count. The jury found the same two aggravating circumstances existed for each crime: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious, or cruel man-

* Pike Hall, Jr. Associate Justice pro tempore, in place of Mr. Justice Lemmon.

ner. The trial judge subsequently imposed the death sentence.

Defendant on appeal relies on six assignments of error. The first three assignments of error concern statements made by defendant to various persons which the trial court ruled were admissible. Assignment of Error Number One contends the trial court erred in allowing the introduction of a statement given to Deputy Herbert L. Durkes, Jr. on September 15, 1983, while defendant was incarcerated at the Jefferson Davis Parish jail. In Assignment of Error Number Two, defendant argues the trial court should not have permitted the introduction of the testimony of his aunt, Zula Lyon, regarding statements defendant made to her. Assignment of Error Number Three involves the introduction of testimony of Deputy Ervin Trahan as it relates to a statement made by defendant while being transported by Trahan and Sheriff Dallas Cormier to the Feliciana Forensic Facility for psychiatric evaluation.

Defendant in the Fourth Assignment of Error complains of the admission into evidence of the objects seized at the two crime scenes, arguing their admission violates his Fourth Amendment right to be protected from warrantless searches and seizures. In Assignment of Error Number Five, defendant alleges the trial court erred in allowing the State to introduce numerous color photographs of the five homicide victims. The final assignment of error contends the trial judge erred in failing to grant defendant's motion for a mistrial following a state witness's reference to defendant's theft of a radio.

We have added two issues not specifically addressed by counsel in brief to ensure full review, noting they were raised during oral argument. These issues are the finding

of the sanity commission hearings and defendant's withdrawal of the dual plea of "not guilty and not guilty by reason of insanity."

We therefore treat in this opinion the six assignments of error, the additional issues, and we also review the sentence. Because we find no error in the trial court proceedings and find the conviction and sentence to be valid under the law, we affirm.

FACTS

The victims in this case were all related to defendant: two were his cousins, Randy Perry and Bryan LeBlanc; two were his parents, Grace and Chester Perry; and the fifth victim was defendant's two-year-old nephew, Anthony Bonin. They were shot in separate households located only two doors away from each other. The cousins died first in the residence located at 639 Louisiana Street in Lake Arthur, Louisiana. Defendant's parents and nephew died next, inside the Perry's home at 810 Seventh Street. The circumstantial evidence from which these facts were derived was presented by the prosecution through the testimony of a number of witnesses. Other information was obtained from a statement defendant gave to Deputy Herbert Durkes while defendant was incarcerated.

On July 17, 1983 defendant apparently entered the unlocked house on Louisiana Street in the early morning. He walked first to the living room couch where Randy Perry lay asleep. From a short distance of only a few feet, he fired into the left eye of his cousin. The accused then entered the bedroom where Bryan LeBlanc slept, and again fired the gun at the victim's head.

It appears defendant then walked across the yard to his parents' home at 810 Seventh Street and broke into the

house. He listened to music for a while, awaiting his parents' arrival home from an out of town trip. His parents, on their return home, stopped to pick up the two-year-old, Anthony Bonin, whom they cared for when his father worked offshore.

At about the time the parents arrived home, several people in the vicinity heard loud noises or gunshots. In the statement defendant gave to Deputy Durkes admitting to the five murders, defendant indicated his father came through the door first, followed by the child and the mother. According to this statement, he shot his father first, then his mother, and then the child. There appeared to be some struggle with his father, whose body was found crouching behind the television in the living room. Because his first attempt did not kill either of his parents, he shot both of them a second time in the head. Not being sure the child was dead, he shot him a second time also. After dragging his mother's body away from the door so he could close it, he took his father's billfold containing \$3,000 cash, and a strongbox belonging to his mother. He left the scene in his father's car.

The caretaker of the 639 Louisiana Street residence, Ernest Ashford, discovered the bodies of Randy Perry and Bryan LeBlanc shortly after 5:00 P.M. on July 19, 1983. The caretaker was the son-in-law of the owner of the house and the stepfather of Bryan LeBlanc. Ashford had a key to the house, and had entered the house out of concern for the diabetic Perry. Ashford notified police, who later entered the residence of Grace and Chester Perry and discovered the bodies of the other three victims.

Defendant became a suspect because of the bad relationship he had with his parents. Defendant lived in a trailer behind their home and was not allowed to enter

their home without their permission. Zula Lyon, defendant's aunt, testified in the guilt phase of the trial that defendant's motive for the killings was to obtain insurance proceeds from his parents' policies. Another possible motive was the fact defendant's parents had taken him to a mental hospital in Galveston for examination when he was sixteen and had him committed to the Central State Hospital at Pineville two years later. According to testimony, he was infuriated at his parents for committing him and had consequently threatened to kill them. Interrogated as to why he killed the victims, Deputy Durkes gave this account of defendant's statement:

Why did you kill all those people? The boys threw me out of my grandmother's house, stole money from me all the time, and harassed me constantly. My mother and father wouldn't leave me alone. They made me live in that little trailer behind their house by all those stinking dog pens. They took all my money all the time, wouldn't let me in their house when I wanted. I just couldn't take it anymore.

I asked him why he killed the child. The kid was evil, some sort of devil, witch of some sort. I asked—I'm sorry. I said that the child was too young to do him any harm or even talk, so why kill him? He was a very smart kid, he said, too smart for his age. I had to make sure he was dead.

Defendant arrived in Washington, D.C. on July 18, 1983, the day after the murders were committed. He checked into the Annex Hotel. While there, he paid rent in advance for his room, giving the clerk five one hundred dollar bills. He also bought numerous items from a television store, which were loaded by a clerk into a car matching the description of that owned by his father. On July 31, 1983 defendant had an encounter with another guest at the Annex Hotel which led to the police being called. An

officer ran a routine check on defendant and learned he was wanted in Louisiana for five counts of homicide. At the time of his arrest he had in his possession \$1,100 cash and a hotel key. Following his arrest, the Washington police obtained a search warrant for his hotel room. Among the evidence recovered was one of the recently purchased television sets, with the names of the five victims written on the side. The vehicle driven by Chester and Grace Perry on their trip was recovered approximately one week later in a Washington, D.C. police impoundment lot where it had been towed for being parked in a no parking zone.

Following his transport back to Louisiana defendant was indicted on five counts of first degree murder. Defendant initially entered the dual plea of "not guilty and not guilty by reason of insanity" to each charge. A sanity hearing was held to determine his competency to stand trial, and the judge ordered he be sent to Feliciana Forensic Facility for further psychiatric evaluation. Subsequent to his return from this evaluation, another sanity hearing was held. At the close of this hearing defendant was allowed to withdraw his dual plea and enter the single plea of "not guilty," against the advice of counsel.

The issue of defendant's sanity is material to assignment of errors one and three, and is also relevant in the determination of whether or not defendant should have been permitted to withdraw the dual plea initially entered and replace it with a plea of "not guilty." Even though not included in the assignment of errors, we address the finding of the sanity commission hearings and the withdrawal of the dual plea because of their overall importance and effect on other assigned errors, and because we deem it imperative to afford a defendant assessed the death

penalty a review of all issues raised in his behalf regardless of whether formally asserted.

DETERMINATION OF COMPETENCY

Defendant was the subject of two sanity commission hearings, the first on September 26, 1983 and the second on March 1, 1985. The first commission was composed of Dr. Louis E. Shirley, Jr., a general practitioner with some capacity to treat psychiatric disorders, and Dr. Young Hee Kang, a general practitioner who completed a residency in psychiatry. After brief interviews with the defendant in the parish jail on September 26, 1983, both were of the opinion he needed further psychiatric evaluation. They summarized their findings:

We find that he has a long history of paranoid schizophrenia and at this time is not in complete contact with reality and may be dangerous to himself and others. We were not able to ascertain his mental state at the time of the alleged offense(s). We feel that he needs complete psychiatric evaluation and therapy at this time.

As a result of this hearing the defendant was sent to the Feliciana Forensic Facility, for evaluation and treatment. The record does not reflect when the defendant was returned to Jefferson Davis Parish, but defendant was apparently returned in March of 1984.

Upon motion of the State, the second sanity commission was appointed. This commission was composed of the same two physicians who were on the first commission, plus an additional physician who specializes in psychiatry, Dr. Aretta J. Rathmell.

At this second commission hearing, the three physicians unanimously agreed defendant was mentally competent and could assist his counsel in his defense. The trial

court agreed, finding the evidence clear, and ruled accordingly.

It is fundamental to our adversary system of justice that a defendant who lacks the capacity to understand the proceedings against him or to assist counsel in preparing a defense may not be subjected to trial. La.C.Cr.P. art. 641; *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). This Court in *State v. Bennett*, 345 So.2d 1129 (La. 1977), set forth the appropriate considerations which a trial judge must use in the determination of competency:

Appropriate considerations in determining whether the accused is fully aware of the nature of the proceedings include: whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. Facts to consider in determining an accused's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett*, supra, at 1138.

It appears the examining physicians and court abided by these criteria. Dr. Rathmell, the psychiatrist, and the

first of the three doctors on the commission to testify at the second sanity commission hearing, in particular paid attention to the criteria. She read from her report, which followed almost verbatim the factors set forth in *Bennett*, and concluded defendant was presently sane and able to proceed with trial. Her opinion was based on two ninety minute interviews with defendant, and evaluation of medical reports from the two State hospitals to which defendant had been committed. Some of these reports came from Feliciana Forensic Facility, and were the result of months of observation. She noted the records compiled by the psychiatrists at Central State Hospital at Pineville diagnosed the accused as having a paranoid illness, which she indicated is more of a character trait of state of mind than is the more serious schizophrenia illness. She characterized schizophrenia as a more incapacitating thinking disorder. She believed defendant has periodically had severe psychiatric problems, but agreed with the earlier psychiatric diagnoses from Central State Hospital. She found at the time of defendant's examination by her he was in remission of a paranoid illness. Though on cross-examination Dr. Rathmell admitted other hospital records characterized the defendant as having paranoid schizophrenia, she noted those words always appeared with the signature of non-medical personnel. Dr. Rathmell noted no psychiatrist had ever documented the diagnosis of acute paranoid schizophrenia.

Dr. Shirley did not include in his opinion of defendant's mental condition as many of the criteria from *Bennett* as did Dr. Rathmell. However, he still addressed several of them in his testimony during examination. Dr. Shirley was firm in his conclusion the defendant seemed to be able to assist his counsel at trial, to be aware of the charges against him, and to be able to help in his defense. Dr.

Kang, like Dr. Shirley, also did not include all of the criteria, but was of the opinion he could assist his counsel, understand the trial he was facing, and understand the consequences of possible conviction.

It should be noted additional support for the finding of competency is evident in the testimony of Dr. Theresa Jiminez, who testified during the penalty phase of defendant's trial. Dr. Jiminez is a certified psychiatrist, and was employed as clinical director at Feliciana Forensic Facility during the time defendant was being evaluated there under court order. Her duties included determining whether or not patients were mentally ill. She testified there are two types of mental illnesses: schizophrenia, which is a major mental illness, and those illnesses that constitute personality disorders. She classified defendant as having a personality disorder, of an anti-social type. She also indicated defendant is smart enough to act in a crazy manner if he feels he needs to do so. Further, she stated if a person is suffering acutely from a major mental illness, as opposed to a personality disorder, he would not have the capacity to plan and reason out his acts as was necessary for the crimes involved here. He would not be able to think logically, lay in wait for someone to come home, plan a murder, hide evidence, or know to flee from town.

A comparison of the length of examinations and credentials of Drs. Rathmell and Jiminez, as opposed to Drs. Shirley and Kang, is significant in weighing the opinions of each as to credibility. Drs. Shirley and Kang had both earlier diagnosed defendant as being paranoid schizophrenic. Dr. Rathmell spent approximately three times as long with defendant as did Drs. Shirley and Kang; Dr. Jiminez had the benefit of months of her own personal observation and reports of other staffers while the

accused was a patient from October 1983 to March 1984. Both Drs. Rathmell and Jiminez are psychiatrists; neither Dr. Shirley or Dr. Kang is a psychiatrist. Dr. Shirley himself, during his testimony, indicated a willingness to defer to the greater experience and expertise of Dr. Rathmell.

The defendant has the burden of establishing incapacity, because Louisiana law presumes the defendant is sane and responsible for his actions. La.R.S. 15:432. The defense must prove by a clear preponderance of the evidence the defendant is incompetent to stand trial as a result of a mental disease or defect. La.C.Cr.P. art. 641; *State v. Machon*, 410 So.2d 1065 (La. 1982). While a court is permitted to receive the aid of expert medical testimony on the issue, the ultimate decision of competency is the court's alone. La.C.Cr.P. art. 647; *State v. Rogers*, 419 So.2d 840 (La. 1982). A trial court's determination of the mental capacity of a defendant is entitled to great weight, and his ruling will not be disturbed in the absence of manifest error. *State v. Morris*, 340 So.2d 195 (La. 1976).

The weight of the evidence supports the trial court's determination of competency. The expert witnesses in the sanity commission hearing at which competency was found were examined thoroughly by both prosecution and defense. The three examining physicians were unanimous in their conclusion the defendant was able to proceed with trial. It is true there were some diagnoses of defendant as having paranoid schizophrenia, made by non-psychiatrists. However, the weight of the evidence, in terms of both the duration of the interviews and expertise, supports the finding of either a personality disorder or paranoid illness, as opposed to the more disabling thinking disorder of schizophrenia. In light of this evaluation of expert testimony, we cannot find the trial court's deter-

mination of defendant's competency to be clearly erroneous.

WITHDRAWAL OF DUAL PLEA

The issue of withdrawal by defendant of the dual plea was considered by the trial judge immediately following the sanity hearing. Though the change of plea was not included in the assignment of errors, we address this issue because of its importance in assuring complete review and because it was raised during oral argument.

During the interval between the appointment of the second sanity commission and the hearing on March 1, 1985, the trial court received correspondence from the defendant. In this correspondence the defendant informed the court of his desire to withdraw his dual plea of "not guilty and not guilty by reason of insanity" and enter the single plea of "not guilty." The attorneys were notified of defendant's wish and of the court's intention to consider this request if the defendant was found mentally competent at the sanity hearing.

Following the finding of competency, the defendant was informed the court was aware of his desire to withdraw his dual plea on all five counts and replace it with the single plea. He told the court emphatically he wanted to change the plea. The trial judge questioned the defendant about his education, learning he had completed 13 college hours of credit in general studies. The judge clarified and explained thoroughly what the plea of "not guilty and not guilty by reason of insanity" meant. Defendant related he and his attorneys had spoken at length about the change in plea, and in response to the judge's question, he again expressed his desire to withdraw the dual plea. Out of an abundance of caution, the judge called a recess for the express purpose of providing defendant a final con-

sultation with his attorneys, and specifically instructed defendant to listen to his attorneys. After a forty minute recess, the defendant had not changed his mind and still wanted to change his plea. Over the objection of his counsel, the court permitted defendant to withdraw his dual plea and enter a plea of "not guilty," relying on the holding of *State v. Clark*, 305 So.2d 457 (La.1974). The relevant portion of *Clark*, *supra*, provides as follows:

This Court cannot approve the trial court's action in requiring the defendant to maintain such an untenable position when he desires to withdraw the insanity portion of the dual plea unless there is some overriding rationale for refusing a defense request to withdraw such a plea. The reason for La.C.Cr.P. art. 561's specific time limits within which a defendant may of right change a simple "not guilty" plea to the dual insanity plea is to give the State adequate notice of defendant's intention to advance the insanity defense and adequate time to prepare in the face of such a defense. See Official Revision Comment to La.C.Cr.P. art. 561. No such rationale is applicable in the reverse situation. When defendant seeks to withdraw the insanity portion of a dual plea and stand on a simple "not guilty" plea, no prejudice to the prosecution results. However, denial of a request for permission to withdraw the dual plea results in substantial prejudice to the defendant in a criminal prosecution. The defendant may withdraw the dual plea and substitute the single plea of "not guilty" at any time prior to the presentment of the indictment and defendant's responsive plea to the jury. *Clark*, at 463.

It is true the instant case is distinguishable from *Clark*, as it does not appear in *Clark* the plea was withdrawn over counsel's objection. However, this Court has recently dealt with this specific issue in the capital case of *State v. Lowenfield*, 495 So.2d 1245 (La.1985), where the accused also wished to withdraw his plea of insanity against his attorney's advice. The Court stated the following:

It appears beyond argument that when a competent defendant wishes to plead not guilty rather than not guilty by reason of insanity, and clearly understands the consequences of his choice, then the counsel must acquiesce to the wishes of his competent client. The court had no choice but to allow the defendant to withdraw his pleas and in this we find no error. . . . *Lowenfield*, at p. 1252.

We consequently find the trial court ruling permitting defendant to withdraw his plea is correct.

ASSIGNMENT OF ERROR NO. ONE

Defendant's first assignment of error challenges the admissibility of a statement he made on September 15, 1983 to Herbert L. Durkes, Jr., a jailer at the Jefferson Davis Parish jail during the time defendant was incarcerated there. Defendant argues primarily his mental state at that time prevented him from giving a free and voluntary statement.

In the early morning hours of September 15, 1983, defendant informed Durkes he wanted to confess. Durkes told defendant he would call Detective Ervin Trahan or Chief Deputy Ted Gary to hear his confession, but defendant said he did not want to talk to them because they did not want to listen to him. Durkes therefore secured the presence of Robert Lee, the other jailer on duty, and of Daniel Peer, a trustee. Peer stood out of defendant's line of vision, along the wall beside the door to defendant's cell. Durkes and Lee squatted down so they could listen at the opening in the steel cell door through which food is placed into the cell. From that position they could see defendant's face and shoulders. Durkes read defendant his *Miranda* rights and asked if he understood them, to which defendant responded yes. He asked defendant if he wanted a lawyer present and defendant said he did not.

Durkes listened as defendant confessed and subsequently went to his desk and wrote down the account. Lee and Peer read the written statement and agreed it matched what defendant had said. Durkes took the handwritten statement to a typist who then typed it.

Before the State can introduce what purports to be a confession, it must affirmatively show it was made freely and voluntarily, and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La.R.S. 15:451. In addition, if the statement was made during custodial interrogation, the State bears the burden of showing defendant received and waived his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Nelson*, 459 So.2d 510 (La.1984).

At both the hearing on the motion to suppress and at trial, Durkes indicated he did not promise anything to defendant, did not threaten or intimidate him, coerce him or place any physical or mental duress upon him. Durkes described defendant as alert during the giving of the statement and stated he had defendant's full attention. Defendant made eye contact with Durkes and was responsive.

Furthermore, the record clearly demonstrates Durkes read defendant his *Miranda* rights and defendant does not contend otherwise. Rather, defendant's attack on the admission of the confession focuses upon whether the statement was freely and voluntarily made, considering his mental condition at the time he gave it. He relies heavily on his having been diagnosed as paranoid schizophrenic a short time before giving the statement and was soon to be sent to Feliciana Forensic Facility. In order to assess the merit of this argument, it is necessary to

review the testimony from the September 26, 1983 sanity commission hearing held shortly after the statement was given, as well as from the August 21, 1985 hearing on the motion to suppress where the statement was ruled admissible.

As earlier indicated, on September 26, 1983, Drs. Shirley and Kang examined defendant and testified at a sanity hearing held that same day. They concluded he was paranoid schizophrenic, and we have previously disregarded this finding in favor of the diagnoses provided by the more experienced psychiatrists. However, while defendant contends the characterization of paranoid schizophrenia by Drs. Shirley and Kang should result in his statement being excluded, we find much in their testimony which supports a finding it was made freely and voluntarily.

Dr. Shirley stated he found defendant well-oriented to time and place, and very up-to-date on current events. The doctor characterized him as very aware of what was going on around him, but determined defendant did have some "flights of fancy" during the examination in which he lost contact with reality. These "flights of fancy" did not occur all the time and resulted when certain subjects were brought up by the use of trigger words.¹

¹As stated by Dr. Kang in the second sanity commission and the motion to suppress hearings, trigger words were used in examining the defendant to determine his reaction to subjects that had previously resulted in psychotic behavior on his part. This defendant reacts visibly to the words "Olivia Newton-John." The mention of those words has caused him, after previously exhibiting no psychotic manifestations during an interview, to behave in a deviant manner. He would start rambling, become aggressive and hostile, and talk endlessly. In this way he evidences his loss of touch with reality.

Dr. Kang, in her testimony, concurred in Dr. Shirley's finding of defendant's "flights of fancy" being triggered by certain topics. They both felt further evaluation was necessary, and neither could ascertain what his mental state was at the time the offense was committed due to defendant's lack of recall of that time period.

Both doctors also testified at the hearing on the motion to suppress held on August 21, 1985. They reiterated their earlier testimony concerning defendant's "flights of fancy" being triggered by certain words or subjects. Dr. Shirley also stated a person with paranoid schizophrenia would be in touch with reality much of the time. Dr. Kang supported this by stating defendant was "more or less" cognizant of what was going on around him until the trigger words were mentioned.

Defendant relies upon *State v. Glover*, 343 So.2d 118 (La.1977), for his contention that defendant's mental state precluded his confession from being free and voluntary. In *Glover, supra*, this Court ruled statements made by the defendant inadmissible because at the time he gave them it was probable he was actively psychotic and legally insane. It is true the defendant in *Glover*, like the defendant in this case, had been diagnosed as a paranoid schizophrenic. However, it should be noted *Glover* also was mentally retarded and suffered from organic brain damage.

Even were we to accept the characterization of the instant defendant as being paranoid schizophrenic, this should not automatically render his statements inadmissible. In *State v. West*, 408 So.2d 1302 (La.1982), this Court rejected defendant's argument that his paranoid schizophrenia made it impossible for him to give a voluntary statement, and ruled the admission of the challenged

statements into evidence was not erroneous. The Court distinguished West's condition from that of Glover, noting in particular Glover's organic brain damage in addition to his mental illness, as well as the fact Glover received a very potent anti-psychotic drug.

Defendant in this case appears to be more like West than Glover. He was not being medicated before he made the statement. There is no evidence he suffers from organic brain damage or is mentally retarded. To the contrary, when the trial judge questioned him in court to determine his understanding of the plea withdrawal issue, it was learned defendant had completed thirteen hours of college studies and left school because he fell behind. Drs. Shirley and Kang both stated defendant seemed in contact with reality until he heard the trigger words, and these words were not a part of the conversation between defendant and Durkes. The statement given does not indicate rambling or jumping from subject to subject. Durkes testified defendant was alert, responsive, made eye contact, and gave Durkes his full attention during the giving of the statement.

The determination of the admissibility of a confession is a question for the trial judge, and his conclusion will not be disturbed unless not supported by the record as a whole. *State v. Nuccio*, 454 So.2d 93 (La.1984). We conclude the trial judge did not err in ruling the statement was admissible. The evidence supports his finding defendant did not suffer from mental illness to the degree necessary to result in exclusion because of involuntariness. Thus, we find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. TWO

In this assignment of error defendant alleges the trial court erred in allowing the State to introduce the testi-

mony of Zula Lyon regarding statements defendant made to her. He contends Mrs. Lyon served as an agent for the sheriff's office and, as such, *Miranda* warnings should have been given. Zula Lyon is the defendant's aunt and his mother's sister.

The statements complained of were given on two of the ten to twelve occasions defendant was visited by Mrs. Lyon in 1983. On September 16, 1983, he told his aunt he remembered the murders and had killed five people. He wrote the victims' names down on a piece of paper he had in his cell. He also told her his father had \$3,000 in his wallet, which he took. He related he used pistols and shotguns to kill the victims, and disposed of the weapons and some luggage in a canal.

On September 30, 1983, as Mrs. Lyon was preparing to leave after a visit with defendant, he again told her he killed the people. He added the judge did not want him to plead guilty because the case was too serious. He said he was guilty and repeated he had killed the people.

It is evident from Mrs. Lyon's testimony she had motives in visiting defendant other than to solicit information for the sheriff. While she admitted she had asked defendant questions about the murders on some of her visits, she specifically stated she had not questioned him on September 16, 1983. The purpose of her visit on that date was to bring winter clothing to defendant in preparation for his transfer to the Feliciana Forensic Facility. She also expressly stated she had never been asked to question defendant.

Similarly, the reason for her visit on September 30, 1983 was to visit him one more time before defendant left for Feliciana Forensic Facility, to see what his state of mind was and to see if he was in need of anything. It is

clear Mrs. Lyon did not question him on that date. According to her testimony, the statement on that date was volunteered by defendant as Mrs. Lyon was getting ready to leave.

Defendant alleges Mrs. Lyon received special treatment from the sheriff's office, implying this would not have been the case had she not been eliciting information with the intention of relaying it to the sheriff. While it is true on some of her visits to defendant Mrs. Lyon talked with him in the sheriff's office, her testimony also makes it clear she did on some occasions see him in his jail cell in solitary confinement. Also, although she admitted she talked with the deputies a number of times about the case, she maintained they never asked her what defendant had said to her.

From Mrs. Lyon's testimony, it does not appear she was acting on behalf of the sheriff's office when she visited defendant and talked with him about the crimes. In particular, it should be noted neither statement was the result of questioning by her and both statements were instead unsolicited, spontaneous confessions of guilt.

This Court has previously considered a similar situation in *State v. Loyd*, 425 So.2d 710 (La.1982). Loyd was given his *Miranda* rights and the defendant made incriminating statements after invoking his right to silence. These statements were elicited by defendant's mother who had been called by a deputy for the express purpose of obtaining information from the defendant. She spoke with him once, did not receive adequate information, and later in the morning sought permission to talk with him again. The sheriff consented and asked her to try to extract information regarding the whereabouts of the missing child. After she talked with her son, a family

friend also talked with him. Then defendant's mother had another conversation with him. Before this conversation the sheriff requested that she ask her son if he would talk with the deputies.

Loyd challenged the admissibility of incriminating statements made to his mother, asserting they were not admissible because they came after he had exercised his right to cut off questioning. The Court held otherwise, reasoning the questioning by defendant's mother occurred out of the officers' presence. It noted police efforts to elicit incriminating statements from him did not constitute custodial interrogation within the meaning of *Miranda*, unless a person realizes he is dealing with the police. The Court specifically stated the mother "was not a police officer or agent. . . ." *Loyd* at 717. The Court continued with the following:

Consequently, in the absence of any interplay between police custody and police interrogation, the mere fact that the defendant was in custody was not so intimidating, nor his mother's questioning so menacing, as to bring *Miranda* into play. *Loyd* at 717.

The Court in *Loyd* relied on its earlier decision in *State v. Rebstock*, 418 So.2d 1306 (La.1982), where the sixteen-year-old charged with commission of the crime challenged the admissibility of an inculpatory statement made to his father before being advised of his *Miranda* rights. The Court ruled the statement was admissible, despite the argument by defendant the father acted as an agent of the police and thus violated his constitutional rights. The Court said the father voluntarily undertook to question his son, and their brief conversation was not an extension of police interrogation. It noted the compulsion conceptualized in *Miranda* as resulting from interrogation was not present. Finding the defendant and his father had

a short private conversation, out of the presence of the police, the Court ruled the defendant was not subjected to interrogation as defined in *Miranda*.

After reviewing the circumstances under which the statements were given and the applicable case law, we find no error in their admission by the lower court. This is especially required after comparing the instant situation to the more compelling facts in *Loyd*, in which this Court refused to exclude the statements given by the defendant to his mother. We find Mrs. Lyon was not acting as an agent for the sheriff. She did not question him on the two dates he gave the unsolicited confessions. Both statements were made when no police were present, so they were not the product of custodial interrogations. We particularly note the first of the statements came the day after defendant had confessed to Durkes. Apparently defendant was simply ready to confess. We accordingly find no merit in this assignment.

ASSIGNMENT OF ERROR NO. THREE

Defendant complains in his third assignment of error of yet another statement admitted into evidence against him. He made this statement while enroute to the Feliciana Forensic Facility.

Sheriff Dallas Cormier and Deputy Ervin Trahan transported defendant on this trip. Sheriff Cormier had invited defendant's counsel to accompany them, but counsel declined stating he was too busy. While enroute, defendant began spontaneously talking about the case. Neither the sheriff nor deputy questioned defendant or initiated conversation about the five counts against him. Rather Sheriff Cormier told defendant not to say anything because they did not want to talk about the case without his attorney present. Defendant nevertheless

continued, on his own volition, to talk. Several times he asked Deputy Trahan if they had found the guns used in the homicides. Trahan eventually replied they had not. Defendant then explained where the weapons could be found. During the trip defendant also spoke about his family members who had been killed, and wondered about the judge handling the case, inquiring as to whether he had sentenced anyone to the electric chair.

Defendant contends the statement regarding the location of the guns should not be admissible because the doctors had already diagnosed him as paranoid schizophrenic, referring the Court to his first assignment of error. As discussed above, we have earlier disregarded this testimony. However, even were we to agree with this medical conclusion, the diagnosing doctors testified defendant lost contact with reality when the trigger words, Olivia Newton-John, were used. Otherwise, defendant remained in contact with reality. We note Deputy Trahan testified those trigger words were not brought up during the trip to Feliciana.

Nonetheless, the circumstances in which this statement was given differ from those of the statement challenged in the earlier assignment of error. Both the sheriff and deputy testified defendant talked throughout the entirety of the trip, and said he changed subjects frequently. This might suggest defendant's mental state was less stable than it was when he spoke with Durkes. However, in rebuttal to that possible conclusion is the fact defendant always returned to and primarily wanted to talk about the subject of the murders. He also did not change topics to the extent he would change them in mid-sentence. Sheriff Cormier testified defendant was awake and remained alert during the trip. These facts indicate to us defendant was in contact with reality during the trip

and wanted to convey the information regarding the location of the guns to the sheriff and deputy. Moreover, the accuracy of the statements was borne out when the police recovered the guns from the drainage canal defendant had suggested they search. As the State argues in brief, this shows defendant was in touch with reality when he made the statements. We find the trial judge correct in ruling the statement should not be excluded because of defendant's mental condition.

Defendant raises another objection to the admissibility of this statement, relying on La.R.S. 15:450. He argues the statement should not be admitted because it was only part of the conversation which took place during the trip to the Feliciana Forensic Facility. La.R.S. 15:450 mandates the following:

Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford.

In brief defendant objects in particular on the ground that admitting only part of the confession prevented him from showing the true state of defendant's mind, how defendant changed from topic to topic during the course of his statement and how defendant was or was not in touch with reality. He contends the only portion of the statement admitted was that part beneficial to the prosecution.

A reading of the transcript reveals defense counsel did not object to the statement on the basis of La.R.S. 15:450 during direct examination. It was not until defense counsel had cross-examined Deputy Trahan rather extensively that he objected. Under these circumstances, it appears objection came to late.

Furthermore, both defense counsel and the prosecution questioned Deputy Trahan thoroughly about defendant's conversation and did elicit information in addition to that concerning the location of the guns. Trahan indicated defendant "rattled on" about a number of subjects, including whether the trial judge had ever sent anyone to the electric chair and the fact he had thrown a strong box containing a check over a bridge while going to Baton Rouge.

Finally, even if the whole statement was not admitted into evidence, this Court has treated a similar situation in *State v. Marmillion*, 339 So.2d 788 (La. 1976). It found the following:

Nevertheless, in the absence of proof to the contrary, the fact that the purported statement of the accused as testified to by the investigating officer does not consist of a verbatim reiteration of the conversation between them, due to the witness' inability to recall or other valid explanation, the rights of the accused under Section 450 are not violated. The law does not require the production of nonexistent portions of the confession or portions which cannot be recalled. *Marmillion, supra*, at 793.

We find this assignment seeking exclusion of defendant's statement during transport to be without merit.

ASSIGNMENT OF ERROR NO. FOUR

The defendant seeks by this assigned error to suppress all evidence seized at the two murder scenes on the day or days following discovery of the bodies. He contends the admission of this crime scene evidence violates his right and the public's right to be protected from warrantless searches and seizures.

There is no dispute the officers had a right to make warrantless entries of the two murder scenes on the reasonable belief persons within might be in need of immediate aid, to see if there were other victims and to determine if the perpetrator of the crimes was still on the premises. *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The sheriff's office secured both crime scenes until the next day and re-entered on July 20, 1983 to conduct an investigatory search, collecting evidence and removing items which required laboratory analysis. These subsequent searches of the murder scenes were warrantless although, as the State concedes, there was time to obtain a search warrant for the murder scenes. In fact a warrant was obtained to enter and search the trailer which the defendant occupied. Defendant had a privacy and proprietary interest in his deceased parent's house, he argues. Moreover, defendant argues the public has an interest in preventing the admission of evidence from an illegal search. (The argument of the public's right against warrantless search and seizure was raised in brief and oral argument, but no authority was given.)

Defendant relies upon *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), which he cites for one proposition: there is no murder scene exception, therefore, a warrantless search is not constitutionally acceptable simply because a homicide has recently occurred there. *Thompson v. Louisiana* overruled this Court's opinion, *State v. Thompson*, 448 So.2d 666 (La.1984), which held a warrantless search of defendant's home was valid when defendant had a diminished expectation of privacy in her home because she called for aid after murdering her husband, and because her daughter, called by her mother, let the police in on her apparent authority over the premises.

The U.S. Supreme Court held the opinion was indistinguishable from and conflicting with *Mincey v. Arizona*, *supra*. Thompson was tried for the murder of her husband. Deputies were summoned to the house by defendant's daughter, who reported a homicide. The daughter said the defendant shot her husband, attempted suicide by ingesting pills, but then called her daughter, told her of her acts and asked for help. The daughter called police and went to her parents' house, admitting the deputies. The deputies found the defendant unconscious and her husband dead of a gunshot wound. Defendant was transported to the hospital. Homicide investigators arrived thirty-five minutes later, entered the premises and searched the scene for two hours, locating incriminating evidence of the murder and attempted suicide.

The Supreme Court held the two-hour general search of defendant's house was a significant intrusion on her privacy and was invalid without a warrant. Discovery of the evidence did not occur in the initial sweep of the house for victims or the killer, or in the plain view exception in the initial entry. Defendant's call for help did not convert her home into a public place where no warrant is required. The Supreme Court in *Thompson* reaffirmed the rule that "searches, conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions." Consent is one of the exceptions to the warrant requirement.

The State contends police lawfully entered the murder scene at 639 Louisiana Street upon the consent of Paul "Blue" Perry and Edward Ashford. Three men resided at this house: Paul "Blue" Perry and the victims Randall Perry and Bryan LeBlanc. Ashford was the caretaker for

this house and his stepson, Bryan LeBlanc, lived there. Ashford's wife was concerned about Bryan, a diabetic, and Ashford went to the house about 5 P.M. on July 19, 1983, at her urging. He found the doors locked and could not get an answer from within. The front door fell off its hinges as he knocked on it. He walked in and discovered the bodies. After Ashford sought police help, he met the police chief at the house and told him to go inside. After other officers arrived, two officers walked to the Perry residence two doors away and saw on the carport floor pieces of flesh, skull and bone marrow. They then entered the second murder scene, at 810 Seventh Street.

The State argues it had the initial consent of Ashford, the caretaker, to enter 639 Louisiana Street. The only surviving resident of the house at 639 Louisiana was Paul "Blue" Perry, who was working on an offshore oil rig at the time of the murders. Chief Deputy Ted Gary said he spoke to "Blue" Perry and obtained consent for the continuing searches of his house. Perry was returned to Lake Arthur after the bodies were discovered. Gary recalled talking to Blue Perry before re-entering the house. In addition, the State argues, Ashford was sufficiently related to the house to give consent. Ashford was the caretaker, had a key to the house, and had ongoing permission to enter the house whenever he deemed it necessary.

There is no showing that defendant possessed any privacy interest at 639 Louisiana Street. He did not reside there and had no property there. Neither Ashford nor Blue Perry withdrew the consents to search the house. Both had sufficient interest in the house to give valid consent to enter for all the searches. We uphold the warrantless searches of 639 Louisiana Street as lawful consent searches.

Defendant also objects to the evidence seized at 810 Seventh Street, where his parents lived. The bodies of his parents and two-year-old Anthony Bonin were found inside, when deputies entered after finding the two bodies at 639 Louisiana Street and discovering pieces of skull, flesh and bone marrow in the carport outside 810 Seventh Street. Again, the initial entry was unequivocally lawful, since officers were searching for victims or suspects.

Michael Owen Perry did not reside at 810 Seventh Street at the time of the murders. He lived in a trailer behind his parents' home. There is ample evidence that defendant was not permitted in his parents' home without their permission. The doors were kept locked and Michael Owen Perry was not given a key. He had to knock to be admitted. There was no showing defendant had any of his property within his parents' home, or that he used it as an extension of his residence. Officers found evidence of forced entry into the house. Defendant's statement to the jailer admitted he broke into the house to wait for his parents. There is no proof defendant had a privacy interest at 810 Seventh Street. To the contrary, he could not enter the house of his own will and he had no property inside. This case is distinguishable from *Mincey* and *Thompson*, where in both cases the defendant's home was searched. There was no living person who had a privacy interest in the house at 810 Seventh Street. Therefore, the entries of the house were not in violation of anyone's privacy interest.

The Louisiana Constitution does not limit standing to challenge a search to those who live in the premises and thus have a reasonable expectation of privacy in it. La. Const. Art. I, § 5 provides in pertinent part. "Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its

illegality in the appropriate court." (Emphasis added.) This first part of the section states that every person has the right to "be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy." Thus, it seems that there must be an invasion of *someone's* rights to privacy before there can be an unreasonable search.

It is well settled that the Fourth Amendment to the United States Constitution protects people, not places. It is the individual's reasonable expectation of privacy that our society values and the constitution protects. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

State v. Hines, 323 So.2d 449, 450 (La.1975).

Michael Owen Perry was a resident of the trailer and the search of that residence was with a warrant. The evidence seized from the two murder scenes was properly admitted into evidence. There is no merit in this assignment.

ASSIGNMENT OF ERROR NO. FIVE

Defendant argues the trial court erred in allowing the State to present to the jurors numerous color photographs of the five homicide victims. He contends the photographs were not necessary for any probative purpose and inflamed the jury, overwhelming their reason. (We will discuss later in this opinion whether the use of the photographs introduced an arbitrary factor into the jury's sentencing recommendation.) The photographs were unnecessary, he argues, because the pathologist who performed the autopsies testified to the cause of death, the location and number of gunshot wounds, the type of weapon used and the approximate distance of the victim from the gun when fired. Sheriff's deputies testified in great detail to the location of the victims in the

house, the location of gunshot holes in the walls, the splatter of blood, tissue and brains; the deputies used drawings, cut outs and body figures to illustrate their testimony.

Defendant objected timely at trial to the admission of the photographs into evidence. The judge admitted the photographs in evidence, commenting, "I think the probative value will outweigh whatever prejudicial effect could happen. I realize, of course, that they are unpleasant pictures to look at but that's one of the situations that we, as well as jurors, have to face in a case of this kind It corroborates everything this doctor (the pathologist) was saying in the cause and effect and the other aspects, and I think that the corroboration in this matter is very important, so we're going to admit them."

The State introduced a total of 170 color photographs in evidence. The photos show the interior and exterior of the two houses, the condition of the house as it was found and photos of the houses after the victims were removed. There are eight photos taken at the pathologist's directions before he began autopsies. The total also includes four portraits of the victims as they appeared in life. The great majority of the photographs are a painstaking photographic tour through the two houses, with officers taking pictures of all conceivably relevant evidence. Of the 158 photos taken at the two murder scenes, 23 show one or more of the victims.

The photographs of the remains of five murdered persons can not be less than gruesome. The pictures are unpleasant. All the victims were struck in the head with blasts from a shotgun fired at close range, sometimes at point-blank range. Many of the photographs show the destruction of the skulls, particularly the photographs

taken prior to autopsy. No amount of testimony or the use of diagrams can depict the murders with such effect as the photographs.

The defendant cannot force the State to use drawings or other evidence instead of photographs. The defendant cannot deprive the State of the moral force of its case by offering to stipulate to what is shown in photographs. *State v. Watson*, 449 So.2d 1321 (La.1984); *State v. Lindsey*, 440 So.2d 466 (La.1981). The court's admission of allegedly gruesome photographs will be overturned on appeal only if the prejudicial effect of the photographs clearly outweighs their probative value. *State v. Watson*, supra; *State v. Boyer*, 406 So.2d 143 (La.1981).

The photographs of the murder scenes are clearly relevant, corroborating the testimony of the State's witnesses as to the location of the bodies, the apparent sequence the murders occurred in and the multiple gunshot wounds to at least two of the victims.

This Court will not find the photographic evidence was admitted in error unless the photographs are so gruesome as to overwhelm the jurors' reason and lead them to convict the defendant without sufficient other evidence. *State v. Watson*, supra; *State v. Ward*, 483 So.2d 578 (La.1986).

The photographic evidence was admitted during the trial's guilt phase following testimony of the investigating officers and the pathologist on Friday, October 25, and Saturday, October 26, 1985, respectively. The court recessed for the weekend following introduction of the last of the photographs. Trial resumed Monday, October 28, 1985. Guilty verdicts were returned October 31, 1985, and the jury deliberated and decided on the death penalty the same date. The emotional impact of the photographs

had time to dissipate before the State concluded its case and the jury reached the deliberative stage. Without doubt, the primary effect of having viewed the photographs was to impress upon the individual juror the seriousness of the task to which he or she was sworn. The State was entitled to no less.

This Court, in *State v. Lowenfield*, 495 So.2d 1245 (La.1985), considered the admissibility of photographs of five murder victims. Lowenfield was convicted of murdering four adults and one child in his former girlfriend's house. All the victims were shot in the head and all suffered multiple gunshot wounds. The weapons used were a .38 caliber pistol and a .22 caliber rifle. This court found the prejudicial effect of the pictures did not outweigh their probative value. The photographs of murder victims are admissible to prove corpus delicti, to identify the victims, to corroborate the cause of death to show location, placement and severity of wounds. One photograph of each victim was put into evidence.

We find the photographic evidence was relevant and probative in proving the State's case against Michael Owen Perry. They proved corpus delicti, helped identify the victims, corroborated the cause of death, the types of weapons used and the location and severity of the wounds. We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. SIX

Defendant's sixth and final assignment of error contends the trial judge erred when he failed to grant defendant's motion for a mistrial following a state witness's oblique reference to the defendant's theft of a radio. Defendant argues this evidence of other crimes preju-

diced the jury against him and led to his conviction on five counts of first degree murder.

We find no merit in this assignment of error. This Court has addressed similar situations and found other crimes evidence insignificant when weighed against the offense for which the defendant was on trial. *State v. Parker*, 421 So.2d 834 (La.1982), cert. den., 460 U.S. 1044, 103 S.Ct. 1443, 75 L.Ed.2d 799; *State v. Abercrombie*, 375 So.2d 1170 (La.1979), cert. den., 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787. In *Parker*, supra, the defendant was on trial for two counts of first degree murder in connection with the armed robbery of a restaurant. Defendant's arrest came 17 days after the robbery-murders, following another armed robbery, when police chased the car defendant occupied. The prosecutor carefully deleted reference to the second armed robbery but explained the apprehension of defendant as the consequence of a traffic violation. This Court said: "The evidence of misdemeanor traffic violations was hardly evidence of other crimes of any significance and did not portray him prejudicially as a 'bad man' capable of murder." *Parker* at 840. The same thing, in the context of multiple murders, might reasonably be said of the theft of a radio.

In *Abercrombie*, supra, there was evidence of a minor vandalism, but the Court said such evidence would not "inflame a jury to the point that it would be influenced to convict an accused of first degree murder." *Abercrombie* at 1176.

The reference to Perry's alleged theft occurred in the explanation of his apprehension in Washington, D.C. The murders occurred in Lake Arthur, Louisiana, around noon on July 17, 1983. Perry arrived in Washington, D.C. in late evening on July 18, 1983. The bodies were dis-

covered the next day. Perry was arrested July 30, 1983. He came to the attention of Washington police after a person checking into a Washington hotel complained Perry walked off with a radio belonging to the hotel guest. The Washington policeman testified he was merely running a routine check on the man involved in the theft complaint when he was informed Perry was wanted in Louisiana for five murders. The policeman had not yet arrested Perry for theft.

An explanation of the Washington arrest was necessary to lay the foundation for introduction of evidence found in Perry's Washington hotel room, and the discovery of Perry's parents' automobile in Washington. A television set recovered from the Washington hotel room was found with the names of all five victims marked on the side of the set. The mention of Perry's alleged theft of the radio came as the prosecutor questioned Washington patrolman James Young about how he came into contact with Perry. Young said Perry and the complaint were disputing the ownership of a radio. Defendant objected timely.

The defendant is correct that the State may not introduce evidence of other crimes without giving notice that it intends to do so. *State v. Prieur*, 277 So.2d 126 (La.1973). The State replies it never intended to introduce evidence of the theft of the radio and carefully avoided saying theft. In fact, the prosecutor replies, the defendant's counsel was the first person to categorize the encounter as a complaint of a theft.

We find no merit in this assignment. The evidence of the theft of a radio pales in significance to the five counts of first degree murder and would not portray defendant as a "bad man" capable of murder.

CAPITAL SENTENCE REVIEW

This Court reviews every death sentence to determine if the penalty is excessive. La.C.Cr.P. art. 905.9 and Louisiana Supreme Court Rule 28. The Court is required to determine:

- (a) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
- (b) Whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
- (c) Whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

PASSION, PREJUDICE AND ARBITRARY FACTORS

The jury's conviction of Perry for first degree murder on all five counts was supported by the jury's finding of two aggravating circumstances on each count: the offender knowingly created a risk of death or great bodily harm to more than one person; and the offense was committed in an especially heinous, atrocious or cruel manner.

We have previously discussed, in Assignment of Error Number Five, the State's use of multiple color photographs of the victims, and the effect of the photographs during the guilt stage. We now decide if the photographs introduced an arbitrary factor into the jury's recommendation of the death penalty.

The photographs were introduced in the guilt phase, and were not used in the sentencing phase to arouse the jurors' hostility toward the defendant. In the context of a case with substantial proof of guilt for five unprovoked murders a death penalty recommendation is not surprising. It is difficult to believe the photographs pushed the

jury toward a recommendation of death for this mass murder.

The State contended the murders were committed in an especially heinous, atrocious or cruel manner. To prove this, the State introduced, inter alia, photographs of the victims.

The use of evidence to prove a statutorily enumerated circumstance in support of the death penalty, although it may prejudice the defendant's interests, does not introduce an arbitrary or prejudicial factor sufficient to require the penalty be set aside. We find the evidence of this alleged aggravating circumstance did not constitute an arbitrary factor in the proceedings.

The defendant contends further the jury was influenced by an arbitrary factor when the prosecutor misstated the law during closing argument of the sentencing phase. We find the misstatement does not present reversible error. The prosecutor spoke only in rebuttal of defense counsel's closing argument, but during that rebuttal, the prosecutor said, "The law says any person that's convicted of a first degree murder shall be sentenced to death."

The Court will not reverse on the basis of an improper comment during closing argument unless the Court is convinced the comment influenced the jury and contributed to the verdict. *State v. Bates*, 495 So.2d 1262 (La.1986); *State v. Ford*, 489 So.2d 1250 (La.1986). There was no defense objection to this misstatement of the law. The misstatement was overcome by the judge's instructions to the jury. The court correctly stated the law requires a unanimous finding of an aggravating circumstance and requires the weighing of any mitigating circumstances prior to the jury's decision to consider the death penalty. The judge's charge in effect informed the

jury a person found guilty of first degree murder does not automatically receive the death sentence.

MITIGATING CIRCUMSTANCES

The defense argues the jury ignored the mitigating circumstances of defendant's alleged mental disorders. The defense counsel used its closing argument at sentencing to focus on defendant's mental condition. Counsel asked the jurors to consider defendant's appearance, mannerisms and conduct during the eight-day trial. Defendant's counsel said the defendant was not like normal people, that he had a mental disorder which caused him to commit a vicious crime, which normal people abhor. Three doctors had testified the defendant suffers from a mental disorder, the jury was reminded. The prosecutor's rebuttal said murderers are not ordinary people: "That's why they do what they do." He said the physicians who believed defendant was sane observed him for five months at a mental institution. Through both the defense counsel's argument and the court's instructions to the jury, the jurors were reminded they had to consider mitigating circumstances.

Defense counsel argues the mitigating circumstances were apparently overlooked by the jury. We find the conflicting medical testimony on defendant's mental condition was provided to the jury and the jurors chose to believe the State's experts, that the defendant did not suffer from a mental disorder so overwhelming that he was insane or unable to control or understand his actions.

STATUTORY AGGRAVATING CIRCUMSTANCES

The jury found the evidence supported the existence of two aggravating circumstances: the offender knowingly created a risk of death or great bodily harm to more than

one person; and the offense was committed in an especially heinous, atrocious, or cruel manner.

The evidence fully supports the aggravating circumstance: defendant knowingly created a risk of death or great bodily harm to more than one person. He killed two young men at 639 Louisiana Street within seconds. Defendant's parents and his two-year-old nephew were gunned down as they entered their home. He not only created a risk of death to more than one person at each crime scene but converted the risk into accomplished actuality. The random firing of weapons, as shown by the physical evidence, cannot be less than a risk of death to the multiple persons present at the scenes.

The jury's finding that the murders were committed in an especially heinous, atrocious or cruel manner was previously discussed in the consideration of arbitrary factors in sentencing. It is unnecessary that we consider the subject matter in the context of statutory aggravating circumstances. Only one aggravating circumstance need be found for the imposition of the death penalty. La.C.Cr.P. art. 905.3; *State v. Bates*, supra; *State v. Byrne*, 483 So.2d 564 (La.1986); *State v. Rault*, 445 So.2d 1203 (La.1984). Since we have determined the jury was correct in finding the offender created a risk of death or great bodily harm to more than one person, the death penalty is validated.

PROPORTIONALITY OF THE SENTENCE

The Court is required to weigh the sentence of death against the particular defendant and the offense(s) of which he is found guilty.

Michael Owen Perry was 28 when he committed these five murders. He lived in a small trailer behind his par-

ents' home. He was unemployed, despite having graduated from high school, then attending one university briefly and later completing thirteen hours of college credit at LSU-Eunice. His work history was brief. He either resigned or was fired from his jobs. His uncle said the defendant stated he would not work because his parents had to support him.

Perry was one of three children. His brother died in an oil rig accident. Susan, his sister, has been committed to Central Louisiana State Hospital on several occasions. Perry's history of emotional or mental disorders dates to 1979, when his parents asked he be examined by psychiatrists at the University of Texas Medical Branch Hospital at Galveston. There is no evidence he was hospitalized then. In March 1981, his parents obtained his commitment to Central State Hospital at Pineville. He was discharged on May 22, 1981 and referred to a community mental health clinic. On September 11, 1981, he was readmitted to the hospital at Pineville, but he walked away the same day and returned home, where his parents apparently allowed him to stay.

The reports of mental health professionals and general practitioners who examined him subsequent to the homicides has been set forth previously in great detail, and we will not reiterate that evidence. We note only the jury apparently chose to believe the state's expert witnesses and their opinion that the defendant's mental problems did not rise to the level of insanity. Even the physicians who testified for the defense said Michael Owen Perry was smart enough to act as if he were insane when it might benefit him. They also said Perry could conform his behavior to the norm most of the time.

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a

Sunday morning, two as they slept in their beds. After killing his parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

We must also weigh this death sentence against the death sentences imposed in other cases in the jurisdiction in which this case was tried. *State v. Ford*, supra. If the recommended sentence is inconsistent with sentences imposed in similar cases, an inference of arbitrariness arises. *State v. Glass*, 455 So.2d 659 (La.1984).

Although the homicides occurred in Jefferson Davis Parish, the trial was moved to East Baton Rouge Parish after the court experienced initial difficulty in selecting a jury. Since 1978, there have been five murder trials in East Baton Rouge Parish where the jury recommended the death penalty. All those cases involved the death of one victim. One case was the rape and murder of an eleven-year-old child. The other four cases were murders committed during an armed robbery.

In *State v. Williams*, 392 So.2d 619 (La.1980), defendant James C. Williams was convicted of killing a service station owner during an armed robbery. The case was remanded by this Court for the judge's failure to instruct the jury that lack of a unanimous sentence recommendation would result in a sentence of life imprisonment. After remand, defendant received a life sentence.

Robert Wayne Williams was executed for the murder of a supermarket security guard during a holdup. *State v. Williams*, 383 So.2d 369 (La.1980), 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828. The victim was shot in the face with a shotgun.

Colin Clark was convicted of a murder-armed robbery and this court affirmed his conviction and death sentence, *State v. Clark*, 387 So.2d 1124 (La.1980). A federal court later reversed the conviction and the sentence. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982). Clark subsequently entered a guilty plea to first degree murder without capital punishment.

The conviction and death sentence of Andrew Lee Jones for the rape-murder of an eleven-year-old child was affirmed by this Court in *State v. Jones*, 474 So.2d 919 (La.1985), *cert den.*, ___ U.S. ___, 106 S.Ct. 2906, 90 L.Ed.2d 993.

Jeffrey C. Clark killed his victim during an armed robbery. His conviction and death sentence were affirmed. *State v. Clark*, 492 So.2d 862 (La.1986).

None of these cases involves multiple victims. In Perry's case, the State argued the murders were committed during the perpetration of an aggravated burglary of the two houses and the armed robbery of Perry's parents. The jury did not return with a verdict agreeing with the state's argument on those circumstances.

In a case most similar to this one, this Court affirmed the death sentences imposed on Leslie Lowenfield for three counts of first degree murder. He was also convicted in Jefferson Parish of two counts of manslaughter. *State v. Lowenfield*, *supra*. Lowenfield killed his former girlfriend after she spurned him. He also killed three other members of her family and a neighbor who ran into the house

when he heard gunshots. The psychiatrists who examined Lowenfield found him to be "angry, primitive, paranoid, and narcissistic." Lowenfield, unlike Perry, did not have a history of treatment in mental hospitals.

Defendant did kill all five victims in their homes. In *State v. Williams*, 490 So.2d 255 (La.1986), this Court found a review of death cases state-wide showed juries "often find death sentences appropriate where an innocent victim was murdered inside the sanctuary of his or her own home." *Williams*, *supra* at 264.

The death sentences for five offenses of first degree murder is not disproportionate to other cases in East Baton Rouge Parish where the death penalty was recommended.

SANITY DETERMINATION PRIOR TO EXECUTION

The State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime. *State v. Allen*, 15 So.2d 870 (La.1943). No state imposes the death penalty on the insane. *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the court or the prosecutor. La.C.Cr.P. art. 642.

If the defendant seeks a sanity commission prior to execution, he bears the burden of providing the trial court with a reasonable ground to believe he is presently

insane. *State v. Allen*, supra; La. C. Cr. P. art. 642; *State v. Lowenfield*, supra. Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution.

We have discussed extensively Perry's mental capacity to proceed despite his withdrawal of the plea of "not guilty and not guilty by reason of insanity." We have determined the defendant was capable of proceeding at trial. A similar review might be in order prior to execution. We stress that the determination of defendant's sanity is for the trial judge, not a sanity commission alone. *State v. Rogers*, supra.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes except that this judgment shall not serve as a condition precedent to execution as provided by La. R.S. 15:567 until

- (a) defendant fails to petition the United States Supreme Court timely for certiorari,
 - (b) that court denies his petition for certiorari,
 - (c) having filed for and been denied certiorari defendant fails to petition the United States Supreme Court timely under their prevailing Rules for rehearing of denial of certiorari, or
 - (d) that court denies his application for rehearing.
- CONVICTION AND SENTENCE AFFIRMED.

Number 9-85-472

Section V

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE OF LOUISIANA

Plaintiff

versus

MICHAEL OWEN PERRY

Defendant

Honorable L. J. Hymel

Judge Presiding

MINUTES OF COURT

[RECORD—P.1] THURSDAY, JANUARY 14, 1988: CHARGE, FIRST DEGREE MURDER (5 CTS.). This matter came before the Court for a status conference, pursuant to previous assignment. Motion to enroll Keith Nordyke, Judith G. Menadue and June E. Denlinger was filed herein, and the Court granted same. All three counsel were present in court, and Mr. Rene Salomon, Assistant Attorney General, was present for the State. Motion to withdraw as counsel of record was filed on behalf of Mr. Michael Vitiello, and the Court granted same. The Court appointed Doctors Aris Cox and Theresita Jiminez to

examine the accused herein. Defense counsel then moved to have psychologist appointed to examine the accused. The court gave each side five days within which to submit a list of psychologists that they wished appointed herein, including their addresses and phone numbers. Motion for Medical Records was filed herein by Mr. Nordyke, and the Court signed motion ordering the Department of Corrections to produce said on or before the 4th, day of February, 1988. Certified copy of motion and order to be sent to Department of Corrections. Sanity Hearing fixed for hearing on April 20, 1988 at 1:00 p.m. The Court ordered that Mr. Salomon prepare the necessary paperwork to have the accused present on the date of hearing. Court met with Mr. Nordyke, Ms. Menadue and Ms. Denlinger and discussed Rule 1.4 of the Louisiana Code of Professional Responsibility, this being an in-camera discussion. The Court set aside the appointment of Mr. Richard M. Arceneaux, and Mr. Clarence E. Romero, who were also present just prior to in-camera discussion, [RECORD—P.2] and also left prior to discussion taking place.

THURSDAY, JANUARY 21, 1988: CHARGE: FIRST DEGREE MURDER. (5 CTS.) This matter came before the Court instanter. Court, pursuant to Supreme Court orders in this case, is appointing a sanity commission to determine the present sanity of defendant. Pursuant to letters received from counsel for State and Defense, the Court is appointing Drs. Glen Estes, Dr. Curtis Vincent, Dr. Aris Cox and Dr. Theresita Jiminez. Sanity hearing date previously set was retained.

Motion for State To Supply Funds With Which to Hire A Psychiatrist And Psychologist file herein; Court ruled said motion moot as Court has appointed doctors requested by defense for a sanity commission.

Ex Parts Motion For Delegation of Decision Making Authority filed herein; Court granted said motion and appointed Keith B. Nordyke as defendant's representative in these criminal proceedings authorized to make decisions on behalf of defendant as deemed necessary and in best interest of Michael Owen Perry. Defense counsel to submit written orders in conformation with the minute entry within ten days.

Pursuant to defense counsel's request both of the above Motions have this date been filed and *sealed* and placed in the record of these proceedings.

WEDNESDAY, APRIL 20, 1988: CHARGE: FIRST DEGREE MURDER (5 CTS.) This matter came before the Court for a sanity hearing, pursuant to previous assignment. The accused was present in court represented by Mr. Keith Nordyke and Ms. June Denlinger and presence of Ms. Judith Menadue was waived. Mr. Rene Soloman, Assistant Attorney General, was present for the State of Louisiana. Mr. Joe Gierrusso enrolled as counsel of record also and Court signed order granting same. Sanity hearing then came on to be heard. Testimony being heard and evidence introduced and Mr. Soloman objected to video taping testimony of accused and Court overruled same. Further testimony was heard and Defense rested. Court took matter under advisement and will ruled on May 26, 1988 at 9:00 a.m. Defense given until May 6, 1988 at 5:00 p.m. to file memos. State has until May 20, 1988 at 5:00 p.m. to respond. State to prepare order for accused to be present for ruling.

[RECORD—P. 3] WEDNESDAY, MAY 18, 1988: CHARGE: FIRST DEGREE MURDER. (5 CTS.) Court granted motion for extension of time in which to file post-hearing memorandum and reassigned until June 20,

1988. Cancel May 20, 1988. Ruling set for July 22, 1988 at 9:00 a.m. Notify all.

MONDAY, JULY 18, 1988: CHARGE: FIRST DEGREE MURDER. (5 CTS.) On motion of Court ruling on sanity hearing was reassigned to August 26, 1988 at 11:00 a.m. Notify all. Other motion still set for July 22, 1988.

FRIDAY, JULY 22, 1988: CHARGE: FIRST DEGREE MURDER (5 CTS.) This matter came before the Court for motion for release of movable property, pursuant to previous assignment. Mr. Mac Morgan, counsel for the estate, was present and Court granted judgment on rule and signed accordingly.

FRIDAY, AUGUST 26, 1988: CHARGE: FIRST DEGREE MURDER (5 CTS.) This matter came before the Court for ruling and motions, pursuant to previous assignment. Mr. Keith Nordyke and Ms. June Dinlinger, attorneys for the accused were present in court. Mr. Rene Salomon, Assistant Attorney General, was present for the State of Louisiana and Ms. Annette Viator, present for the Department of Public Safety and Corrections. Motion to withdraw as counsel of record filed herein by Ms. Judith Menadue was granted by the State. Ms. Joe Giarrusso, attorney for the accused, was not present today due to having sustained injuries from a recent car accident. Mr. Nordyke objected to the accused not being present herein for these proceedings. The defense objected to the Court considering weekly or monthly reports filed into the record of this case by the officials from the Department of Corrections was overruled by the Court. The Court further ordered that said reports be filed into the record, the Court having considered same, as Court exhibit number one, inglobo. Based on the Court's legal research in this

matter, the Court vacated and set aside its order of January 21, 1988 appointing Mr. Nordyke as the person having authority to make decision for the accused herein. The Court, based on the weekly reports received, ordered Drs. Cox and Jiminez to re-examine the accused relative to his competency as set up by the Louisiana Supreme Court in the original Michael Owen Perry decision. And those doctors are to appear in court on Friday, September 30, 1988 at 0:00 a.m. for their oral testimony concerning their new examination.

[RECORD—P. 4] The Court ordered that pending said hearing, pursuant to R.S. 15:830.1, that the Department of Public Safety and Corrections provide treatment and medication to the accused, as to be determined by the medical staff of the Department of Public Safety and Corrections, until at least September 30, 1988 at 10:00 a.m. when the Court rules on the issues herein. The Court ordered no further memo or briefs from either side. If there is a case decided between now and September 30, that is relevant herein, the Court would accept a copy of said case. The Court will prepare a written order in conformity with its oral order and ordered that the order be served on the accused at the State Penitentiary. Notify Drs. Cox and Jiminez to be present on September 30, 1988 at 10:00 a.m. The Court will rule on this date. Mr. Nordyke objected and assigned error of the Court's basing its decision on said weekly reports and notified the Court of his intention to take supervisory writs herein on this issue, and further objected to the forced medication of the accused, and objected to not having a hearing on that specific issue. Mr. Nordyke requested a transcript and a return date. Mr. Nordyke further requested a stay on the medication. The Court denied request for a stay herein, as well as a transcript. Court gave Mr. Nordyke until September 9, 1988 to perfect writs.

FRIDAY, SEPTEMBER 30, 1988: CHARGE: FIRST DEGREE MURDER (5 CTS). This matter came before the Court for a sanity hearing, pursuant to previous assignment. The accused was present in court represented by Mr. Keith Nordyke, Mr. Joseph Giarrusso, and Ms. June Denlinger. Mr. Rene Salomon, Assistant Attorney General, was present for the State of Louisiana. Continuance of sanity hearing held with testimony being heard and objected being noted. Court continued matter until October 21, 1988 at 10:00 a.m. for additional testimony and ruling.

FRIDAY, OCTOBER 21, 1988: FIRST DEGREE MURDER (5 CTS). This matter came before the Court for continuance of sanity hearing this date pursuant to regular assignment on defendant's report for a competency hearing for determination as to whether or not he possesses sufficient mental capacity to proceed to execution, pursuant to previous assignment. The accused was present in court represented by Mr. Keith Nordyke, Ms. June Denlinger and Mr. Joe Giarrusso, Jr. Mr. Rene Salomon, Assistant Attorney General, [RECORD—P. 5] was present for the State of Louisiana.

After considering the evidence adduced in the form of written reports and documents filed herein and the oral testimony of the witnesses presented, for oral reasons this date assigned:

IT IS ORDERED that the defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment.

IT IS FURTHER ORDERED that defendant's competency is achieved through the use of antitropic or antip-

sychothic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication as to be the prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection.

Defense counsel objected to Court's ruling, noted. Court granted counsel's motion for stay order, notifying Court of intent to take writs. Court then set appeal return date or date for perfection of writs for November 22, 1988; assignment of error due: November 16, 1988. Transcript due: November 10, 1988. Court stayed execution of the judgment entered today. State then requested clarification of Court's ruling as to setting execution date for the accused. The Court, for oral reasons assigned, advised State execution date pending awaiting orders from Supreme Court.

**REPORTS FROM THE SANITY COMMISSION APPOINTED
BY THE 19TH JUDICIAL DISTRICT COURT**

[RECORD—P. 26] Curtis M. Vincent, Ph.D.

5000 Constitution Ave.
Baton Rouge, LA 70808
928-6560

March 11, 1988

The Honorable L. J. Hymel, Judge
19th Judicial District Court
Parish of East Baton Rouge
Courthouse
Baton Rouge, Louisiana 70801

RE: Michael Owen Perry

Dear Judge Hymel:

On March 5, 1988, I evaluated Michael Owen Perry alone for 90 minutes and conducted a subsequent interview with a guard who has known him since he arrived in Angola. The guard indicated that Mr. Perry had been taking psychotropic medication for four to six weeks. Mr. Perry has a history of five psychiatric hospitalizations beginning in the John Sealy Hospital and later in Central Louisiana State Hospital (two admissions), Feliciana Forensic Facility and finally in the psychiatric treatment center in Angola State Penitentiary. Discharge diagnoses have varied from Paranoid Schizophrenia to Schizoaffective Disorder. On July 17, 1983, he committed five counts of first degree murder against family members. He was subsequently found guilty, sentenced to death, and imprisoned in Angola. The current evaluation pertains to the issue of competency to be executed.

Mr. Perry presented to the evaluation with a scraggly beard and very short haircut. He has a receding hairline

and there were several black smudges on his face which he indicted were from burning plastic from an audio cassette tape. He initially asked if I was Mr. Nordyke or some other attorney. He was wearing handcuffs, waist restraints and legs chains as is required for death row inmates.

Mr. Perry was fairly tangential during my session with him. At one point he referred to himself as God and stated that he married a woman since being in Angola. He complained of experiencing auditory hallucinations, both at the time of the offense and at the time of the evaluation.

Psychological screening reflects a psychotic disorder characterized by a high level of suspiciousness coupled with a tenuous grip on reality. He has far greater difficulty relating to females than he has with males. The delusional material regarding Olivia Newton-John is one manifestation of this symptom.

An attempt was made to administer the Thematic Apperception Test, but Mr. Perry refused to comply, saying, "No. I hate school." Part of the Competency Screening Test was administered, but he refused to complete that measure as well [RECORD—P. 27] because "it's too hard on my mind." The section which he was willing to respond to, as well as interview material, indicate that Mr. Perry has a sufficient understanding of the functions of the court and its various members. He has an appropriate appreciation for the judicial process and the consequences were he to be found competent to proceed.

Other areas required for competency, however, appear to be significantly impaired. His descriptions of the events leading up to his arrest, reflecting on his guilt or innocence and his state of mind at the time are very inconsistent. Consideration of this factor along with his

questionable ability to evaluate and confirm or contradict testimony, renders him, in my opinion, incompetent to proceed.

I find Mr. Perry's case to be a very interesting one and I appreciate the opportunity to serve on this Sanity Commission.

Sincerely,

/s/ Curtis Vincent, Ph.D.
CURTIS VINCENT, PH.D.
Clinical Psychologist

CV/pcp;

cc: Keith Nordyke
Attorney at Law
228 Napoleon
Baton Rouge, LA 70802
Rene Solomon
Attorney General's Office
1885 Woodale Boulevard
Suite 1010
Baton Rouge, LA 7

[RECORD—P. 30]

Glen Estes, M.D.
Jeanne M. Estes, M.D.
Suite 3

4521 Jamestown Avenue
Baton Rouge, Louisiana 70808-3264
(504) 927-3062

March 15, 1988

The Honorable L. J. Hymel
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

RE: State of Louisiana
vs.
Michael Owen Perry

Sir:

I examined Michael Owen Perry at your request on March 9, 1988 in regard to his mental capacity. Examination took place in his cell in the hospital ward at Angola State Penitentiary, for approximately sixty minutes. Prior to interview he was advised of my identify and my job as a psychiatrist to provide a medical report to the court. He indicated that his attorney, Mr. Nordyke, had sent him a letter explaining that a number of doctors would be asked to provide information for his court hearing scheduled in April.

INTERVIEW FINDINGS:

Interview was very difficult because of Mr. Perry's continual disruptive behavior. He got in and out of bed. He paced around the cell. He got a drink of water. He used the toilet. He gestured as if to give hand signals to someone

beyond the open door. He called out to passersby. He talked to the guards. He put his hand on my jacket and said, "We don't get to see no nice clothes around here." He interrupted and ignored questions to ask questions on his own such as the following:

"This your first trip to Angola?"

"Got a cigarette?"

"Did they strip search you?"

"Let me see your teeth."

[RECORD—P. 31] "You married?"

"You commute back and forth?"

"What kind of pen is that?"

Mr. Perry was often indirect or irrelevant in his answers:

When asked how for he went in school, he said "Thirteen or seventeen hours." Only upon further questioning did it become clear that he was referring to college course hours.

When asked what subjects he studied, he said, "I'm a doctor a little bit, eight percent, now nine percent, now ten percent, eleven percent, twenty-two percent, eighty-eight percent psychiatrist, ninety-eight percent love!"

When asked why he needs to take medicine, he said, "I was in Jackson . . . wearing leg irons . . . and the doctor was making fun of me."

He gave, at different points throughout the interview, a variety of explanations for his crimes and convictions:

He spoke as if he were the victim: He said "they" were picking on him and "they took my stuff . . . my house, the brainwasher . . . and I been ripped off." When asked who "they" were, he said, "It was a setup

. . . Judge Peters." He said the setup was "for the money," which was "probably scattered all over the world by now."

He spoke as if he were somehow justified: "I did the murders. I had to . . . They took everything I had . . . I'm the kingpin, Mafia, so I shot them dead . . . Whoever is the cause of this is going to get sued."

He spoke as if he had a religious mission: "I had to get rid of them, to make them stop breaking the Ten Commandments . . . I'm God."

He indicated that he was simply in the wrong place: "I'm supposed to be in Tennessee now, a clean state."

[RECORD—P. 32] He indicated that he shot his mother, father, two cousins, and nephew "because of the voices" which were saying, "Kill, kill. You broke the nine commandments."

At no point did Mr. Perry verbalize regret or remorse for what he had done. He did not show sadness when speaking about the deaths of his parents and family. He did not acknowledge having done wrong, nor any reason why he should be punished. When asked if the murders were wrong, he said, "I didn't want to shoot those people, but I guess I did the right thing."

He tended not to acknowledge responsibility, or his own role in determining the actions of others toward him. Instead, he tended to present himself as the victim:

He said that, when he was a child his parents "kept whipping me," and it was "for no reason at all."

He said doctors have made fun of him, and they bring him to the hospital "to torture me."

He said that in prison, "I'm having to fight . . . Big people. They want my money but I'm broke."

PAST HISTORY:

It was impossible to get a consistent past personal or medical history from Mr. Perry. Many of his answers were implausible, or contradicted by information from records sources: He said that he got the burn on his leg when he was seven years old. He said he is married, and his wife is now in Belgium. He said was in the Army and the Navy for three years, where he was taught "to be a professional killer." He said the sheriff, in 1982, advised him to escape from the hospital in Pineville.

Mr. Perry did not provide coherent information. His accounts of past personal and medical history tended to be disorganized and not in chronological order. His failures of logical or accurate time references are illustrated by the following:

He indicated that he was married one time. He said he got married "when I was seven years old." He said he has been married now for 8 years.

[RECORD—P. 33] He said they year is "nineteen eighty eight." He said he has been locked up since 1982. He said he was in the Army for one and one-half years, then in the Navy for one and one-half years, then quit the Navy "one and a half years" ago.

He said, "We're really in the year two thousand. This twenty first century, that's bullshit."

CURRENT MENTAL STATUS:

Mental status was generally alert, restless, and inattentive. He was dressed in hospital pajamas, unshaven; no efforts to maintain personal appearance were apparent. He did not appear to be in any physical distress.

His speech was generally clear, but his statements were often disorganized, tangential, or irrelevant. At times, he

spoke slowly, hesitated, gave brief answers, and seemed to have very little to say. At other times he showed rapid, pressured speech and loose associations as he spontaneously expressed a number of ideas jumping from one topic to another.

Mood did not show normal quality and intensity. Some of the time he showed inappropriate humor and smiling. He laughed, for example, when asked what day of the week it was. He laughed when asked to remember four simple words as a test of memory, and said, "That's fun! That's the most part!": Some of the time he showed abnormal blunted affect, little or no emotion at all. He did not appear to display emotional qualities of sadness normally to be expected when a person relates a variety of circumstances from their past concerning other people. Affect to anger was displayed a few times when he rambled excitedly about other people setting him up and taking his money.

Thoughts were often illogical and disorganized. He indicated that he has had his thoughts broadcast out loud to other people: "I found that out this morning; they said I was shouting, but my mouth was shut." He said that his mind sometimes plays tricks on him. When asked what kind of tricks, he said, "All kinds of tricks, sex mostly." He would not elaborate, saying "That's all I can say," and on further questioning revealed that was hearing voices which told him [RECORD—P. 34] "Shut up." He described hallucinations of tones and voices when there is nothing there, for many years, and lately on a daily basis. They seemed to have a realistic quality to him; on one occasion he asked if I could hear the buzzing tone he was hearing. He said the voices always told him bad things, "They're evil." He said there were many voices, "about a thousand of them." First, he reported that he was hearing

them only on his left side; then he said he was hearing them on both sides. On another occasion he reported, "They're sitting down here with me. They say they're going to get me out." Near the end of the interview, he reported they were saying to him, "Screw you."

His sensorium was generally oriented: He was able to give the month as March, the year as 1988, but erred in saying the day, Wednesday, was "Tuesday." He knew the place was "Angola," a prison. He recognized people and various roles: the uniformed guards, and at least one of them by name, for example. He acknowledged his own name, but was inconsistent about his identity because he also said he was "God, in real life." His immediate retention and recall was intact. He was able to repeat a span of 4 digits forward, but could give them in reverse order only after several repetitions and mistaken answers. Abstract reasoning was demonstrated by way of similarities and opposites. Intellectual functions seemed to be variable and inconsistent because of distractibility, inattentiveness, and poor concentration.

Insight and Judgment regarding the nature of his illness and need for treatment were poor. At one point, when asked if he thought he was mentally ill, he said no. He gave different responses at other times when he was asked about being sick:

"I can't say so, but I'm sure I am."

"The medicine makes me sick."

"I'm in the hospital now because I smoke cigarettes."

CURRENT TREATMENT:

Current medications were described as "Haldol" plus another one he did not know the name of. He did not know

how much the Haldol dosage was. He could not be specific about when he most recently had been given any pills or injections. He [RECORD—P. 35] said that they bring him to the hospital "once a month" in order to "shoot me up" with drugs. He seemed to be very excitable, tense, and inconsistent while discussing medicines. He said medicine gives him headaches and stomach aches. He described having had "side effects" such as drooling and tightness in his throat, stiffness, and trouble walking caused by medicine in the past. It was not clear how long ago he had these side effects; or if they were caused by Haldol or some other drug. At one point, he said the medicine helped him sometimes, but he could not detail what symptoms were helped. At another point, he said that it never helped him, and he had no need to take it.

ADDITIONAL INFORMATION:

After my own examination of Mr. Perry, Mr. Nordyke's office provided six volumes of copies of various records which I reviewed:

Feliciano Forensic Facility chart, 10/11/83 to 3/26/84, including Closing Summary (Final Diagnosis Schizoaffective Disorder), correspondence, treatment plans, Admission History, Nursing Assessment, Psychiatric Evaluation, Progress Notes, Psychological Evaluation, Social History, Doctor's Order Sheets, Medical History and Physical, Dental Report, laboratory test reports, Restraint/Confinement/Suicidal Precaution records, ecg and x-ray reports, Drug Charts, and nursing records;

Angola, Louisiana State Penitentiary, 12/20/85 to 2/8/88 (most recent entry), including Medication Records, Emergency Room records, Physicians Clinic records, Sick Call records (latest date 2/3/88), New General Hospital Progress Notes (1/29/88 most recent entry) and Dis-

charge Summaries from multiple admissions, Mental Health and Behavioral Consultation forms, Mental Health Management Orders for close watches (latest date 1/5/88), Inpatient Medication Records (latest date 2/8/88), LSP Nurses' records, LSP Progress Notes (latest date 1/11/88), various x-ray and laboratory reports, Physician's Orders (latest date 1/11/88), correspondence (including some secondary materials such as records from Feliciana Forensic Facility and Central Louisiana State Hospital);

Central Louisiana State Hospital, admission 3/24/81 to 5/22/81 (Judicial commitment) with elopement 4/13/81 to 4/20/81, Discharge Summary (final diagnosis Paranoid Schizo- [RECORD—P. 36] phrenia), Admission forms, Admitting Note, Physical Exam, History and Psychiatric Evaluation, Social Service History, Doctor's Order Sheets, Medication records, Nurses' records, laboratory and x-ray reports, Psychological Report, Vocational Rehabilitation evaluations, Record of Passes, Treatment plan and problem lists, Progress Notes, correspondence; and records of his readmission 9/11/81 (Judicial commitment) with elopement the same day;

Lake Charles Mental Health Center records of outpatient treatment (6 visits 4/4/84 to 10/17/84, for diagnoses of Schizoaffective Disorder and Antisocial Personality Disorder), appointment letter 7/13/81 for Jennings Outreach Clinic; copies of records from Louisiana State University enrollment in 1976 and 1977; and other miscellaneous correspondence.

CONCLUSIONS:

Past history, records information, and current mental status are consistent with psychotic mental illness. In my opinion the most likely diagnosis is Schizoaffective Disorder.

This distinction of Schizoaffective Disorder is not definitive because Schizoaffective Disorder, Manic-depressive illness, and Schizophrenia sometimes may have similar symptoms. Each may include delusions or illogical beliefs; hallucinations; loosening of associations; inappropriate affect; agitation, restlessness, or increased activity; distractibility or irritability; poor judgment; inappropriate behavior and impaired job or social functioning. Also, the symptoms of Schizophrenia, Schizoaffective Disorder, and Manic-depressive illness all may vary with time and with influence of medications.

It is my opinion that Michael Perry's present mental condition would substantially impair his capacity to assist defense counsel. Current mental status shows poor contact with reality and disruptive behavior. He failed to show normal ability in recalling and organizing facts, understanding reasons, and exercising judgment in regard to alternatives.

[RECORD—P. 37] It is my opinion that Michael Perry is not completely aware of the nature of the current proceedings against him. He acknowledged being "on Death Row," and knows "they want me dead." He does not understand his sentence as punishment for what he did wrong. He is aware of his hearing scheduled in April, and said it would be "to find out if I can have an execution date." He failed to acknowledge the finality of his death sentence when he referred to his eventual release from prison: "When I get out of here, they'll pay for it." He also spoke of being God, who cannot be executed, and said that he would not be the one to die.

Very truly yours,

/s/ Glen Estes, M.D.

GLEN ESTES, M.D.

[RECORD—P. 38] Theresita G. Jimenez, M.D.
 Psychiatrist
 Baker Clinic
 2402 Main St.
 Baker Louisiana 70714

March 10, 1988

SANITY COMMISSION EVALUATION

Honorable L. J. "Jay" Hymel, Judge
 Nineteenth Judicial District Court
 Parish of East Baton Rouge, Division "J"
 222 St. Louis St., Suite 658
 Baton Rouge, Louisiana 70801

RE: PERRY, Michael Owen
 Docket #9-85-472 Sec. "V"
 Charge: 5 Ct. First Degree Murder

Dear Judge Hymel:

As per your court order appointing me to a Sanity Commission, I examined Mr. Michael Owen Perry for competency on February 4, 1988 at the Louisiana State Penitentiary at Angola, Louisiana.

My examination consisted of the standard psychiatric and mental status examination. In addition to these examinations, I also discussed with Mr. Perry the charges against him which he understand he is convicted, the circumstances surrounding the charges, and further, matters pertaining to is understanding of the courtroom milieu, and his rights in a criminal proceeding.

It is my opinion, at this time, according to the criteria established by the Louisiana Supreme Court in the Bennett Decision he is not competent, and he is unable to assist an attorney in his own defense. I feel that Mr. Perry

will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die. His medication can be adjusted at the LSP.

If you have further question pertaining to this matter, please do not hesitate to contact me at your convenience.

Respectfully yours,

/s/ Theresita G. Jimenez, M.D.
 THERESITA G. JIMENEZ, M.D.
 Psychiatrist

TGJ:izc

cc: Clerk of Court
 District Attorney
 Keith Nordyke, Attorney, Judith Menadue,
 Attorney,
 June Denlinger, Attorney

[RECORD—P. 315]
 NEURO-PSYCHIATRIC SERVICES, INC.
 1035 Calhoun Street
 New Orleans, Louisiana 70118

Aris W. Cox, M.D.
 Dennis E. Franklin, M.D.
 Patricia K. Boyer, M.D.

September 22, 1988

The Honorable L. J. Hymel, Jr.
 District Judge 19th Judicial District
 Sixth Floor-Governmental Building
 222 St. Louis Street
 Baton Rouge, LA 70801

RE: Michael Owen Perry
 Docket No: 9-85-472

Dear Judge Hymel:

This is to inform you that pursuant to your recent request I have re-examined Michael Owen Perry. The examination took place at the Louisiana State Penitentiary on 7 September 1988. I examined Mr. Perry where he is currently housed, that is on death row.

At the time I examined Mr. Perry, he was being given Haldol Decanoate in the dosage of 2 cc IM every month. In addition, he was being given a supplemental dose of oral Haldol daily. At the time I examined Mr. Perry he was refusing the oral Haldol.

On 7 September 1988, I found Mr. Perry's condition to be deteriorated from my previous examinations of him. Mr. Perry was inappropriate in affect, delusional and exhibited disorganized thought processes. In my opinion he was deteriorating and relapsing even though he was receiving medication. My recommendation to the treat-

ment staff at Angola was that his medication be increased in dosage.

At the time I examined Mr. Perry, however, he was still aware that he was on death row and was under a sentence of death for the murder of five members of his family. As far as being able to participate in, or assist with, any legal proceedings that might arise, I did not feel Mr. Perry was competent to assist counsel in such proceedings.

I hope that this is sufficient information. If you desire further clarification, I will be happy to give it to you either at your convenience or at the scheduled hearing in your court on Mr. Perry on 30 September 1988.

Sincerely,

/s/ Aris W. Cox, M.D.
 ARIS W. COX, M.D.
 FORENSIC PSYCHIATRY CONSULTANT

[RECORD—P. ____]
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Aris W. Cox, M.D.
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April 20, 1988

Honorable L. J. Hymel, Jr.
 District Judge
 19th Judicial District
 6th Floor
 Governmental Building
 222 St. Louis Street
 Baton Rouge, Louisiana 70801

RE: Michael Owen Perry

Dear Judge Hymel:

This letter is written in response to your appointment of me to a Lunacy Commission, to examine Michael Owen Perry. The purpose of this commission is to ascertain Mr. Perry's mental condition, and further to assert whether or not he is mentally competent to be executed.

I began consulting as a psychiatrist at the Louisiana State Penitentiary in July 1987. I have seen Mr. Perry each month (save one) since I began this consultantship. Therefore, I have had a chance to examine him on several occasions. I have also reviewed the rather extensive medical records on Mr. Perry, from his hospitalizations at Central State Hospital, and at the Feliciana Forensic Facility. I have also reviewed his psychiatric records from Angola, where he has now been incarcerated on death row since 1985.

In my opinion, Mr. Perry suffers from schizoaffective disorder. I consider him to be mentally ill to a severe

degree. During the time I have seen him, I have had a chance to observe him both on and off neuroleptic medication. During the times I have seen him off neuroleptic medication. It has been my opinion that he was so psychotic and so out of contact with reality that he could not appreciate the reason for his execution, nor indeed could he appreciate the execution process itself, nor the seriousness of this sentence. At these times Mr. Perry told me that he was God, and he did not feel that the electrocution process would result in his death.

On the other hand I have seen Mr. Perry at times when, on neuroleptic medication, he has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence.

To me the core issue is whether or not Mr. Perry is to be continued on neuroleptic medication, therefore. It is my understanding that his attorney, Mr. [RECORD—P. ____] Keith Nordyke, has received guardianship over Mr. Perry, and he is now refusing neuroleptic medication on Mr. Perry's behalf. It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed.

If you desire any further information in this matter, please contact me at your convenience.

Sincerely,

/s/ Aris W. Cox, M.D.
 ARIS W. COX, M.D.

Forensic Psychiatry Consultant

AWC/jw
 2364.02

19TH JUDICIAL DISTRICT COURT PARISH OF EAST
BATON ROUGE, LOUISIANA

(caption omitted in printing)

EXCERPTS FROM HEARING.
APRIL 20, 1988

[RECORD—P. 501] By the Court: The Louisiana Supreme Court further indicated that the defendant bears the burden of proving and providing the trial court with reasonable grounds to believe he is presently insane. In order for the Court to even commence these proceedings, I am satisfied that the defendant has gone forward with that and, of course, that's what led to the Court appointing a sanity commission.

* * *

[RECORD—P. 510] Dr. Jiminez:

A I have indicated that at the time I examined Mr. Perry he was not competent, and I felt that he would not be able [RECORD—P. 511] to assist his lawyer in his own defense. I also indicated that I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die.

* * *

A Schizoaffective Disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also a problem with his feeling tone or the defective component. When they are in the state of acute illness they [RECORD—P. 512] usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifesting symptoms like not wanting

to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the Schizophrenic component of the illness.

Q Has Michael expressed to you on occasion that he was God?

A Yes, sir.

Q That a delusion or something that he has expressed on fairly many occasions, is it not?

A Yes, sir.

Q And he expressed that to you way back in '83 and '84 when he was at forensic under your care, is that correct?

A Yes, sir. He also mentioned that when I saw him on February 4, 1988.

* * *

[RECORD—P. 516] A He was not consistent in the information that he gave me. He went from thinking he did not—from saying he did not do the act to saying that he did it out of anger.

Q Okay, so we can add to that that he's also inconsistent in statements that he gives to you, right?

A Yes, sir, very ambivalent about things.

* * *

[RECORD—P. 518]Q When you examined him on February 4th of this year at my request do you know whether or not Mr. Perry was on medication then?

A Yes, sir, he was on medication, a small amount of medication, but he was not taking it regularly.

Q What type of medication and what dosages?

A Haldol.

* * *

[RECORD—P. 519]A He had a very poor tolerance for medication, he developed a lot of side effects. He became very stiff and he would also have some drooling, some of which he exaggerated himself.

* * *

A On the Haldol.

* * *

[RECORD—P. 520]A He did better after that but then we had problems also with the side effects so we pretty much had to re-adjust his medicine regularly and watch him closely. He also had a problem about wanting to take medication. He really never was interested in taking medication.

* * *

[RECORD—P. 525]BY THE COURT:

Q Now in your letter addressed to me dated March 10th of '88 you say he does understand that he is convicted and also expressed that he does not want to die. So my question is is he aware of the punishment that he has been ordered to suffer and does he understand why he had been ordered to suffer that punishment?

A Yes, sir, he said, uh, when I first went to talk to him he said he was scared to die, he killed his mother because he was angry. And he asked me to help him be able to live.

* * *

A So he does understand that he's convicted of the death

of his family and he does understand that the penalty is death.

Q And does he understand that he is going to suffer that [RECORD—P. 526] penalty because of his actions?

A I think if he knows that he's being—he's dying because he killed his parents, I think he could understand that that's the result—that his death is the result of the actions that he did.

* * *

[RECORD—P. 527] Q In regards to the Haldol with which Mr. Perry was medicated prior to his trial, and as I understand it, since he's been on death row, he has exhibited symptoms that were side effects?

A Yes, sir.

Q Okay. And some of those were what?

A Some of those exist but at times he would exaggerate them.

Q All right. The symptoms would include drooling?

A Yes.

Q Impaired gait or walking?

A Yes.

* * *

[RECORD—P. 528] Q But if a normal person were to take a psychotropic medication may he also exhibit the side effects of drooling and impaired gait?

A Yes, sir.

Q All right. Now you mention that he exaggerated what, his symptoms?

A Yes, sir.

Q And can you explain to me how would he exaggerate those symptoms?

[RECORD—P. 529] A He would—at times he would be able to move and at times he would not move at all. And, in fact, there was a time there when he would stay just in bed because he claimed he couldn't move.

Q All right, now, at what point, is this prior to trial or is this just since he's been on death row?

A We are talking about his stay at the hospital so that would be prior to his trial.

* * *

Q Now how could you determine that these actions of laying in bed were exaggerated? I mean how could you determine he was able to move when he wouldn't move?

A Because it has been reported that at times he would be able to get up and at times he just refused to get up.

* * *

[RECORD—P. 530] Q Your report mentioned the Bennett criteria but the Bennett criteria is not exactly the criteria upon which we are basing today's determination.

A That's true.

Q All right. Now what is important to today's determination are some of the following questions, and please answer them to the best of your ability. Is it not true that Mr. Perry expressed to you he did not wish to die?

A That's true.

Q Is it not true that he understood his sentence, the death penalty?

A Yes, sir.

Q Now when we say he understood his sentence, the death penalty, how were you able to conclude that he understood it? What component of it did he understand? What was it you explained or did he ask questions of you?

A The first thing Mr. Perry said to me when I went to see him was, uh, I asked him if he remembered me and he said he did. And I said, do you know why I am here. And he [RECORD—P. 531] said to me, you are here to help me stay alive, is what he said to me. And I said, why do you say that. And so we started talking about what his present condition and about what he had done that ended up in his incarceration and the penalty that he had. So that's when he first told me that he did not kill the family, that somebody else killed them, in fact, that man that killed them also had taken a shot at him in the head. Then at the later part of the interview that's when he said at the end that he was very angry with his mother and called her all kinds of names. And he said that the little boy was also a bastard and that his sister was insane. He started being derogative towards the family and stated that he did kill them. So he does understand that he killed them and that he is scared to die. So I say yes to those last questions that you asked. My apprehension with him is he does get ambivalent and he knows—he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness.

Q If I understand what you just told me, Dr. Jimenez, is that his ambivalence is what frightens you, that if he were less ambivalent that he might be more cooperative with the court personnel that are trying to save his life?

A That's true.

Q Is there a medication that you're aware of that can eliminate ambivalence in personality?

A No. It's the extent of the ambivalence that we are concerned about. And that is a part of the illness in Schizophrenia so I thought that maybe if he could become [RECORD—P. 532] more stabilized then maybe there will be less ambivalence on his part.

Q How are we to stabilize him when there are no medications that eliminate ambivalence?

A Well, that's the problem.

Q You have medication that you would suggest issuing, offering and having him ingest to eliminate such ambivalence?

A I don't really know that I would be able to eliminate it because it because—but you could probably try him on a bigger medication and give it to him consistently and see then if there would be a change or there would be some improvement. He had improved before.

* * *

[RECORD—P. 533] Q Do we have free will?

A Yes, sir.

Q And can you see my distinction? Is it possible that Michael's ambivalence, as you term it, is more in line with a refusal to cooperate, a refusal to assist, rather than, as you put it, he is unable to assist?

A There is a certain degree of refusal and there's also a [RECORD—P. 534] certain degree of inability. It's very difficult, and that's the reason why I suggested that I would feel more comfortable if this man were better medi-

cated and better, uh, in a better frame of mind than he is now. Although he does understand that he killed his family and he does understand that he is getting the chair for that crime.

Q Okay. And you have made those determinations pursuant to your interview that he understands why he's being penalized why he incurs and is going to suffer the penalty of death?

A Yes, sir, based on my evaluation that's the conclusion I arrived at.

Q Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A No, sir.

Q The symptoms appear to be the same? They're consistent from your first consultation or observations through to your most recent?

A Well, I had seen Mr. Perry in a better frame of mind.

Q By frame of mind you mean what? More cooperative? Less hostile?

A Yes. And he was able to participate more in interviews. I haven't seen him for two years until I saw him again.

Q And when you first encountered him after two years did you not testify a moment ago that he recognized you?

A Yes.

Q He remembered you? He knew what significance you had in his life?

[RECORD—P. 535] A Yes, sir.

* * *

Q. And, Dr. Jimenez, am I paraphrasing you correctly, I believe, earlier when you said—or testified in this same courtroom on this same witness stand that Mr. Perry is basically smart enough to act crazy?

A Yes, sir.

* * *

[RECORD—P. 550] DR. COX:

* * *

Q Would you agree that Mr. Perry's diagnosis is that of Schizoaffective Disorder?

A Yes, sir.

Q Is that a disease of illness that is going to leave Mr. Perry

A I don't think so, no, sir.

* * *

Q Have you formulated an opinion as to whether or not Mr. Perry is competent to be executed?

[RECORD—P. 551] A Well, as you and I have discussed before, that's a relative thing. It has to do with the treatment Mr. Perry is receiving. I have seen him at times when I did not feel he was competent to be executed. I have seen him also at times when I thought he was competent to be executed.

Q Is there any way of predicting when he is competent?

A When I saw him the last time which was on the 3rd of March he was on neuroleptic medication. He was about as—he was functioning about as well then as I've ever seen him function. At that time I went through the whole matter with him and he was aware of why he—of where he was, what his sentence was, what he would be executed for and was aware of the fact that he could be executed. He was taking Haldol at that time.

Q Are there other times where you've seen him when he was not competent to be executed?

A I have. The first time I saw him I didn't think he was competent, back in July.

Q And other times since then?

A Yes, sir.

Q Has he ever told you that he is God?

A Yes, sir.

Q And that as God he could not be killed?

A Yes, sir, he told me that.

Q Did he also express in I think October of '87 that he was supernatural and could not be killed and he was CI agent and that he was God?

A Yes, sir.

Q The records from Angola indicate that Michael was floridly psychotic on almost a monthly basis if not more often. [RECORD—P. 552] Does that concur with your. . .

A Would you restate that question? I didn't hear all of it.

Q It was probably not stated in psychiatric language. As I read the records from Angola it appears to me that Mr. Perry is hospitalized quite frequently. Why is that?

A He becomes psychotic and is hospitalized by the staff there so he can be given medication and treatment.

Q When he becomes psychotic is he in contact with reality?

A In my opinion, no, sir.

Q Is he competent to be executed during those periods?

A No, sir.

Q Some of those times are even though he is on medication, isn't that correct?

A Yes, sir, even while on medication it takes them a while to respond and the symptoms persist.

Q Doctor, what is EPS?

A It's a syndrome or side effect caused by neuroleptic medication.

Q It stands for extra-parameatal symptoms or extra-parameatal syndrome.

Q Has Michael exhibited those?

A Yes, sir.

* * *

Q Have you noticed some EPS symptoms though?

[RECORD—P. 553] A Yes.

* * *

Q Would you agree that Michael has a history of Schizoaffective Disorder at least since 1981 or somewhere in there?

A He's been given different labels but he has had the history of psychotic illness dating back that far, yes, sir.

Q And basically has been hospitalized on and off since those dates?

A Yes, sir.

Q Is Schizoaffective Disorder something of which he can be cured?

A No, sir.

Q It's like diabetes, it's always going to be with him to a greater or lesser degree?

A In my opinion, yes. It's something that can be managed like diabetes and sometimes it will be worse and sometimes it will be better but it's going to be there.

Q And there's no way to predict when he will become psychotic even when he's on medication?

A It's hard to predict with a hundred percent accuracy.

Q Doctor, out in the hall you indicated that Michael was, quote, at best a moving target. Would you explain to the Court what you meant by that?

A I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him [RECORD—P. 554] back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his com-

petency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

Q So I guess in summary what I've heard you saying is that you've seen him not competent. . .

A Yes, sir.

Q . . . sometimes and you've seen him competent. . .

A Yes, sir.

Q . . . once?

* * *

Q Do you agree with their placing him on that medication?

* * *

[RECORD—P. 555] A That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q And does Haldol affect him beneficially?

A Yes, sir, when he takes it in adequate doses it affects him beneficially.

Q What is an adequate dose, in your opinion?

A Thirty milligrams a day, or more.

* * *

[RECORD—P. 556A] Q Even on medications Mr. Perry can decompensate and become psychotic, can he not?

A Yes, sir, it's possible.

* * *

Q Have you ever seen him psychotic when he was on his medication?

A Yes, sir, I've seen him have psychotic symptoms when he was on medication, yes, sir.

Q When he's on medication and when he is in these psychotic—in this psychotic condition was he able then to be competent. . .

A If you're. . .

Q . . . relative to the sentence in this case?

A I've seen him at times when he was having, I thought, psychotic symptoms but he was aware of the fact that he had a sentence of death and that he could be executed and he could be killed by the execution process, yes, sir.

* * *

Q Have you also seen him during this period of time when he indicated that he was God and that he would get up out of the chair?

A He's indicated to me that he was God—this was the first time I saw him—that he was God, that he could not be killed by electrocution, that it would take several hours for the staff to figure this out and it would be a struggle but that he would prevail and he would not be executed.

[RECORD—P. 557] Q And he's also told you that, I believe, when he's been on medication, hasn't he?

A Yes, sir.

* * *

Q Doctor, you've also, I believe, seen him when he's undergone this forced treatment, have you not?

A Yes, sir.

Q And even after the forced treatment and massive doses of Haldol and he's still sometimes floridly psychotic?

A He gets better. In my mind I think I settled the issue, in fact, I know I settled the issue. He does respond to medication when he's given it and he gets better. How good he gets probably does leave something to be desired but he gets better.

Q Better is a relative term, isn't it?

A Yes, sir.

Q I think that's what's troubling me a little bit. Is there any way to qualify that?

A I don't think I've ever seen Michael, even on medication, be completely coherent, well-intergraded, rational. I've always felt in him there's certain areas of psychotic thinking there.

Q Even in the best days?

A Yes, sir, even when I see him on his best days.

[RECORD—P. 558] A Yes, sir.

Q With the massive doses of medication?

A Yes, sir.

* * *

[RECORD—P. 564] Q Now can you offer to the court any analysis or opinion, * * * on why Mr. Perry would have malingered while medicated with Haldol, as we discussed the one aspect of psychotic illness within Schizoaffective Disorder?

A Well, I think it's obvious he could have malingered psychotic symptoms at some point to escape prosecution for the crime for which he was charged.

* * *

A When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's change in his function. To me, there's [RECORD—P. 565] been a very clear relationship between him being compliant with medicine in the clinical picture that I see when I examine him.

Q Have you ever detected him to be malingering whether on or off medication?

A I can't say that I have, no.

* * *

A It's shall we say easy to malingere symptoms. You come in to see me for thirty to forty-five minutes and just sit there for that limited period of time and act crazy.

* * *

[RECORD—P. 566] Q Did he have the capacity to know of the fact of his impending execution?

A Yes, sir, I went into that with him that day specifically as I do most of the time when I see him. He was aware of where he was, he was aware that he was under a sentence of death. He was aware that he could be killed by the electrocution, and he was aware of why he was there.

* * *

Q Did he understand the reason for the death penalty. . .

A Yes, sir.

Q . . .being imposed?

A He did, though at that time he denied his guilt to me for the crime. And he knew why he was there.

* * *

[RECORD—P. 567] A Neuroleptic medications such as Haldol is the name applied to these medications which are given to people for certain psychiatric illnesses, and they basically suppress, control, or improve the symptoms of the illness.

Q And what illness is the specific case Mr. Perry endures?

A He's being given this drug because he has a diagnosis of [RECORD—P. 568] Schizoaffective Disorder.

Q And this neuroleptic drugs will suppress what particular symptoms of Schizoaffective Disorder?

A Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make him less labile and agitated.

* * *

A Thinking more coherently, and more in contact with his environment.

* * *

A I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. When he's not on medication he ram-

bles so that he goes from talking about the hospital to something that happened before he ever came to Angola,

* * *

[RECORD—P.572] Q And on each occasion do you take the opportunity to discuss his charges, his fate, the penalty he faces?

A Yes, sir, I attempt to.

Q Okay. And have you succeeded in bringing up those subjects in each of your visits?

A Sometimes I have and sometimes I haven't. As I indicated the first of March when I saw him I was able to and we had a very good discussion about it. There have been times when I've not been so successful.

Q And why were you prevented from being successful in your discussions with him?

A Because I thought he was—my answer to that is when I was unable to do so he was so out of contact with what was going on that he really wasn't able to answer the questions. He would tell me things like he was God and that he couldn't be killed.

Q And that's a symptom of, in your opinion. . .

A In my opinion, in his case, it's a delusion which is a symptom of his illness.

* * *

[RECORD—P. 574] A T-A-R-D-I-E D-Y-S-K-I-N-E-S-I-A.

* * *

A These are recognized side effects that occur with these drugs when people take them indefinitely. They don't have to do with their psychiatric condition as such,

they don't make them any more disturbed mentally but they impair their motor function.

* * *

A Do I think he has tardive dyskinesia now?

Q Yes.

A No, I do not think he has it now.

Q What would it take for him to become a member of that class of dysfunction?

A There is a hazard if he continues taking these medications indefinitely, say for the next five years or so, [RECORD—P. 575] that he's got a twenty to twenty-five percent risk of developing this complication.

Q And that complication would impair his gait?

A It's characterized by involuntary chewing, smacking, movements of the lips, involuntary movements or tremors of the tongue and tremors of the upper extremities.

Q Is that going to change your opinion on whether or not he understands the penalty he faces?

A No, that has nothing to do with that.

Q How do you suggest, Dr. Cox, that we manage this Schizoaffective Disorder of Mr. Perry?

A The management of it is—I think he has demonstrated it, he responds to treatment and that the treatment of it is one of these psychotropic drugs.

Q Haldol?

A Haldol is being used, has been used and has been effective. That would certainly be appropriate.

* * *

[RECORD—P. 576] Q And how would he react on medication?

A Well, I talked to him last in March and he very matter of factly told me—we went into it, you know, and he told me that, you know, he realized why he was in prison. And he sat there and very calmly denied to me that he had committed the crime. He said, I wasn't there, I was somewhere else, I didn't do it. when I'd seen him off medication he would become very angry, agitated, loud [RECORD—P. 577] yelling, etcetera. That's the difference I've observed.

Q So he can deny it when he's on medication but. . .

A Yes.

Q . . . he just gets hostile when he's off?

A Yes.

* * *

[RECORD—P. 589] DR. CURTIS VINCENT:

A My opinion as of March 5th of this year was that he was not [RECORD—P. 590] competent to be executed at that point.

* * *

[RECORD—P. 593] Q I believe in 1983 your diagnosis was that of Schizoaffective Disorder. Has that changed?

A I believe that the diagnosis stands today, the same diagnosis.

Q Mr. Perry was psychotic when you saw him?

A In March of this year?

Q Yes, sir.

A Yes, he was.

* * *

[RECORD—P. 594] Q Two days after Dr. Cox did and he was floridly psychotic when you saw him and still on medication at that occasion at that point in time. Is that consistent with the illness of Schizoaffective Disorder?

A I'm assuming he was taking medication at that point.

* * *

A The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. But if indeed he was taking it it's quite possible to be floridly psychotic at one point and yet more rational at other points. And that's not very unusual.

* * *

[RECORD—P. 600] Q Well, did he have organic brain damage?

A I didn't see any evidence of it, no.

* * *

[RECORD—P. 612] A Again, the size is very small. I wasn't getting tremendous cooperation at that point. As you can see, it's a stick figure as opposed to the normal drawing of a person with arms and body and so forth.

* * *

[RECORD—P. 619] Q You mentioned something, doc-

tor, also, about your diagnosis today is the same as it was earlier. To when were you referring?

A I did an evaluation of Mr. Perry in November of 1983 at Feliciana Forensic Facility.

* * *

[RECORD—P. 621] Q In your report back in 1983 it was your recommendation that the treatment team consider psychotropic medication for him. So was it and is it your opinion that if he is placed on medication he does respond fairly quickly?

A Well at that point I had no knowledge whether he would respond quickly or not. Indications were that he would respond because in general people do respond, people who are out of touch with reality do respond to the psychotropic medication to the point where they are back in touch with reality and very often typically become competent to stand trial. I feel he is an intelligent individual and that if reality contact is there he can learn the issues surrounding the charges very quickly.

Q Would Haldol be such a psychotropic medication?

A Yes, it's one of the more common ones.

* * *

[RECORD—P. 623] A I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and he indicated at that point that he would be executed. So there was some understanding that if he's found competent to proceed that he would be executed.

* * *

Q He knows what execution is?

A Yes, he expressed some fear of dying in relationship to that.

Q Now in your discussions did he appear to understand the reason that he was going to be executed?

A That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

Q Did he acknowledge that he committed these murders to you or did he deny it?

A He did both. At one point he said that he committed the murders. We talked about that briefly. Two minutes later I was asking another question and he said that he felt that [RECORD—P. 624] he could be found innocent because he was in Washington, D.C. at the time. I went into that in a little detail as far as witnesses that would provide that testimony. And he said there were a couple of hitch hikers but he doesn't have any idea where they might be, and that the person who checked him in I think on Monday in Washington D.C. could testify as to his whereabouts at that point. It's very inconsistent.

* * *

[RECORD—P. 632] A In this case, I found Mr. Perry to have Schizoeffective [RECORD—P. 633] Disorder. I believe that that would be the appropriate diagnosis at that point.

Q On March 5th, '88?

A That's correct.

Q All right. Did you make that diagnosis earlier in 1983 when you saw him?

A Yes, I did.

* * *

[RECORD—P. 637] DR. GLENN ESTES:

* * *

Q What is your opinion as regards to his ability to understand the nature of execution and his ability to understand the finality of execution?

A Well, he failed to show normal abilities in recalling and organizing facts and understanding reasons in various areas which my opinion would be includes the legal areas of concern, his execution, his conviction, his legal rights, ability to cooperate with various authorities at different times. I would presume that those difficulties would arise in various areas. It's my opinion that he was not completely aware of the nature of the proceedings against him even though he was able to acknowledge that he was on death row when I saw him, and at that time he was able to say that they want me dead, but I did not conclude that he understood his sentence, [RECORD—P. 638] his punishment for what he did wrong.

Q What about the finality of a death sentence as regards to Michael Owen Perry? Did you reach any opinion as to that?

A Well, he failed to acknowledge that because on some occasions when I was talking to him when I saw him he referred to his eventual release from prison. I'm not sure of what the basis of that was but he referred to it as a future event. And he said things, for example, like, when I get out of here they'll pay for it.

Q Did he ever tell you that he was God?

A Yes, he did.

* * *

[RECORD—P. 639] Q Did you arrive at a diagnosis as to what illness, if any, Mr. Perry has?

A I came to a tentative conclusion that the most likely diagnosis would be Schizoaffective Disorder.

* * *

[RECORD—P. 641] Q Would you agree that his current mental status at the time showed poor contact with reality?

A Yes.

Q And poor judgment and poor understanding and inability to organize facts?

A Yes.

Q In particular with regard to determining alternatives from which to choose?

* * *

A He show poor judgment in many areas, including judgment of alternatives.

* * *

[RECORD—P. 646] Q What treatment course do you recommend to make Mr. Perry competent and sane?

A I don't feel prepared to recommend a course of treatment.

Q Well, hypothesize for me. Would Haldol help?

A Possibly. I'm not certain.

Q Prolixin help?

A It could help in some ways.

Q Hypothesize. Any other medications could help?

* * *

[RECORD—P. 647] Q And what would those neuroleptic psychotropic drugs do that would make him sane and competent? How do they work?

A I don't know that they would make him sane and competent.

* * *

[RECORD—P. 653] Q Give me the symptoms that lead you to your conclusion of his inability to understand the penalty he faces.

A His symptoms include disruptive behavior, physical activity, restlessness, interrupting and ignoring questions, indirectness and irrelevancy in his answers, inconsistency in his explanations, tendency to be disorganized when he presented facts, difficulties in presenting facts in chronological order, variations in the pace of his speech, jumping from one topic to another in his ideas, inappropriate moods, indication of having his thoughts broadcast out loud, in- [RECORD—P. 654] dication of hallucination of voices, saying that he was God, failure to consistently recognize whether or not he was mentally ill, tendency not to acknowledge responsibility or his own role in determining the actions of others toward him.

* * *

[RECORD—P. 661] We will call Mr. Perry as an exhibit.

* * *

[RECORD—P. 662] Q Michael, what's your name, please?

A Perry, Michael Owen, God—I was God when I was seven years old. I remember that. And I'm innocent, I didn't do it.

* * *

(Who did you marry, Michael?

A Suzanne Annette Bordelon.

Q How old were you?

A Seven.

Q Tell me how you became God?

A Well, it was a strenuous event. That was the worst time of my life. I spent sixty years in the penitentiary.

* * *

[RECORD—P. 663] Q Michael, if they put God in the electric chair what's going to happen?

A You'd kill me dead, I mean in the twenty years that's the last report, you know. I mean I did my ninety percent, you know, but I believe he's God, you know. I mean he knows the man and, uh, I don't like to cry and I told you I wouldn't try to cry but, uh, I mean that's how I made it first, you know. And, uh, I love my wife, you [RECORD—P. 664] know, and I don't want to lose her, and I don't want to lose ya'll because ya'll the first ones that helped me. And I didn't do it what ya'll trying to say that I did it. I am crazy, nine percent, I go with that, that's for the money, you know.

* * *

[RECORD—P. 671] Q Do you know that you were brought to trail on that. . .

A Yes, sir, I. . .

Q . . . on those charges?

A . . . know, the Captain Arnold told me that.

Q And you understand that the jury found you guilty? Or do you understand that the jury found you guilty of committing those five murders?

[RECORD—P. 672] A But they want me to pay the price.

Q Do you know that the jury found you guilty of committing those five murders?

A I didn't know that. They told me innocent. They sent to Angola.

* * *

[RECORD—P. 688] THE COURT: Is there any other evidence from the Defense?

MR. NORDYKE: We rest.

[RECORD—P. 689] THE COURT: Any additional evidence from the State other than what you presented by way of cross examination?

MR. SALOMON: Yes, your Honor, there is one thing that concerns me greatly, and I think it's relevant to this proceeding. But the only problem is I haven't had access to this particular document.

THE COURT: If it's in the record you've had access to it.

MR. SALOMON: Well, this particular item was asked to be sealed.

THE COURT: What is that?

MR. SALOMON: This is a March 14th, 1988 letter on Nordyke and Denlinger stationary addressed to the warden of Angola State Penitentiary.

* * *

[RECORD—P. 691] THE COURT: So, again, your request to make it part of the record is denied since it already is a sealed document in the case. Any other evidence from the State?

* * *

19TH JUDICIAL DISTRICT COURT, ETC.

[RECORD—P. 290]

June 7, 1988

The Honorable L.J. Hymel, Judge
19th Judicial District, Division "J"
Governmental Building
222 St. Louis Street
Baton Rouge, Louisiana 70801

RE: Michael Owen Perry
DOC #111850

Your Honor:

Based on our prior conversation and the subsequent *amicus* filed by the Department of Public Safety and Corrections in the Perry case, please accept this information from Louisiana State Penitentiary.

Dr. Kovac, as noted, will be following up with weekly reports and of course would be happy to provide you with any other reports necessary.

Sincerely,

Annette M. Viator
Attorney for the Secretary

[RECORD—P. 291]

Louisiana State Penitentiary
Angola, Louisiana 70712

Hilton Butler
Warden

Ms. Annette Viator
Attorney at Law
La. Department of Corrections
Baton Rouge, La.

Dear Annette:

As per our conversation, I am sending documents pertaining to the mental health of Michael Perry. Although I do not see Michael on a routine basis, it has been my observation and understanding that he functions adequately and appropriately while on medication; it is only after he has been off medication that he begins to decompensate.

If further information is needed, please advise. Weekly reports will be forthcoming.

Sincerely,

/s/ Kay B. Kovac, M.D.
KAY B. KOVAC, M.D.
Medical Director

[RECORD—P. 292]

May 25, 1988

To: Dr. Kay Kovac
Medical Director

From: Marie C. Hughes ACSW, BCSW
Mental Health Team

Re: Michael Perry
DOC 111850

In response to your request of May 24, 1988 I have reviewed the above named and numbered inmate's chart. Annette Viator, attorney at Headquarters, requested the following information as I understand it:

1. What behavior does he manifest when he is taking psychotropic medications?

At the times when Mr. Perry's medical record indicates he is taking psychotropic medications and he appears to be stabilized he is able to function fairly well in his environment. He is calm, cooperative, verbally spontaneous with appropriate answers to questions and interacts with security and his peers in a manner which could be considered fair to average for his population. Delusional conversation is usually omitted unless specific questions are asked. He does not threaten to harm himself or others when he is apparently stabilized on medication.

It should be noted that it is common for inmates at Angola to pretend to take their oral medications and actually do not swallow. The only sure way to tell if someone is taking medications is by injections.

2. What behavior does he manifest when he initially discontinues his psychotropic medications?

One of our consulting psychiatrists explained that the blood serum level of psychotropic remains at an effective level somewhere between three to seven days if the patient was stabilized prior to discontinuation. This of course varies with each individual. Outside stressors will also effect this stabilization.

Aris Cox M.D., a consulting psychiatrist, ordered a period to rest off medication on 11/20/87. His record indicates he was admitted to the hospital on 11/30/87. It was necessary for Mr. Perry to be placed on suicide watch as he was considered a possible threat to himself and others.

[RECORD—P. 293] 3. What is he like when he has been off psychotropic medications for an extended period?

When Mr. Perry has been off psychotropic medications long enough to decompensate he exhibits bizarre behavior, threatens to kill himself and others, states that he is God, and associations are loose. He changes the subject in the middle of a sentence and such delusional matter is spontaneously verbalized.

To my the best of my knowledge his homicidal and suicidal threats have only been verbalized since his arrival at Angola. I have never personally witnessed a suicide gesture or homicidal action nor have I seen any documentation to support the fact that Mr. Perry acts on his threats.

If I can be of further assistance please let me know.

Respectfully,

/s/ Marie C. Hughes ACSW, BCSW
MARIE C. HUGHES ACSW, BCSW
Correctional Clinical Social Worker 2

[RECORD—P. 294]

Louisiana State Penitentiary
Angola Infirmary
Physicians Clinic

Name: Michael Perry; DOC: #111850; Camp: D/R;
Job:___; Assign___; B/P:___; Weight:___; Temp:___; Pulse:___;
Resp:___;

Date: 4/29/88

Time:___

On this Friday, 4/29/88 at 1:45 pm I received a phone call from attorney Keith Nordyke who represents Mr. Perry. Mr. Nordyke stated he had been told that Perry had begun decompensating. Mr. Nordyke further stated that I had his permission to do whatever was medically necessary. He stated that there was no need to PEC Perry since he (Nordyke) was his guardian and he (Nordyke) was giving his permission to give psychotropic medications to Perry. I told Mr. Nordyke that the mental health worker (Marie Hughes) had told me Perry was making suicidal threats and was disoriented and on that basis I would not allow him to further decompensate to the point of taking his own life. I told Mr. Nordyke that we would offer Perry the medication; however, if he refused, he would be PEC'd if it felt medically indicated. Mr. Nordyke agreed. Joe Kaysa, legal counsel for DEC was notified and agreed, also.

/s/ Kay Kovac, MD
KAY KOVAC, MD

[RECORD—P. 295]

New General Hospital
Louisiana State Penitentiary

Angola, Louisiana

Name: Michael O. Perry; Doc#: 111850

Date of Admission: Death Row

Mental Health Team Progress Notes

Date Notes Must Be Signed

3-25-88 Michael was seen in the emergency room at the request of Dr. Kovac. Michael's affect was within normal limit; his mood was euthymic. He did not appear to be experiencing any anxiety or distress. No decompensation was noted. No delusions were elicited. His speech was relevant and coherent. Associations were tight.

When asked about his medication he said he was not taking it because his lawyers asked him to stop receiving treatment of any kind from the mental health team at Angola. He said he had a sanity hearing coming up and his lawyers thought it would be in his best interest to be free of all mental health treatment. He said he does not believe he is "crazy" but if "they" think he is, he will not get "burned."

I told him that at this point we could not force him to take medication, but when we feel that he is "gravely disabled" we will **[RECORD—P. 296]** have the authority to force him to take medication. He said that before we force him to take medication he will take it voluntarily. He said he would take it now but he is only following the instructions of his lawyers. We discussed his

well-being and how the medication does help him. He responded by saying that he did not believe the medication does him any good because he does not believe he is "sick."

He then asked me questions about the physical pain involved in being electrocuted. And he said he was not afraid of dying, but he did not to die in the electric chair.

A No problems at this time. No decompensation noted. Michael is not taking his medication and doesn't plan to take it voluntarily unless his lawyers tell him to take it.

P Report interview with Dr. Kovac.

/s/ R. Parat, MSW

[RECORD—P. 297]

3/23/88

Michael Perry
111850

Michael was seen while I was on the tier to see another inmate. He appears to be in fair remission at this time. He was friendly, quiet, and cooperative.

/s/ Marie C. Hughes ACSW/BCSW

[RECORD—P. 287]

NUMBER 9-85-472, SECTION V
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

[caption omitted in printing]

MOTION TO FILE AMICUS CURIAE BRIEF

NOW INTO COURT, through undersigned counsel, comes the Louisiana Department of Public Safety and Corrections, who moves this Honorable Court to allow the Department of Public Safety and Corrections to file an amicus curiae brief in the above-captioned matter on the following grounds:

I.

The Louisiana Department of Public Safety and Corrections is the sole custodian of persons who have been sentenced to death in this state.

II.

Said department has a special interest in determining what custodial powers they are empowered with in regard to treatment of mentally ill persons who have been sentenced to death.

WHEREFORE, the Department of Public Safety and Corrections moves this Honorable Court for leave to file an Amicus Curiae brief in the above-captioned matter.

Respectfully Submitted,

/s/ ANNETTE M. VIATOR

Annette M. Viator

Staff Attorney

Department of Public Safety and Corrections

Post Office Box 94304

Baton Rouge, Louisiana 70804

(504) 342-6743

[RECORD—P. 288]

19TH JUDICIAL DISTRICT COURT

Parish of East Baton Rouge

State of Louisiana

NUMBER 9-85-472, SECTION V

[caption omitted in printing]

ORDER

Considering the above and foregoing:

It is HEREBY ORDERED that the Department of Public Safety and Corrections be allowed to file an Amicus Curiae Brief in the above-captioned matter.

THUS DONE AND SIGNED this 13th day of June, 1988, at Baton Rouge, Louisiana.

/s/ L.J. HYMEL

JUDGE

19TH JUDICIAL COURT
Parish of East Baton Rouge
State of Louisiana

EXCERPTS FROM TESTIMONY TAKEN AT AUGUST 26,
1988 HEARING

* * *

[RECORD—P. 699] The Defense counsel's objection to this Court reviewing those documents is overruled and the Court will file those documents into the record. And the Court has considered those reports.

* * *

[RECORD—P. 307]
19TH JUDICIAL DISTRICT COURT
Parish of East Baton Rouge
State of Louisiana

[Caption omitted in printing]

ORDER

This matter came before the Court on August 26, 1988, pursuant to regular assignment for ruling on the defendant's competency to be executed pursuant to verdict of the jury returned herein and subsequent orders of the Louisiana Supreme Court.

For reasons this date orally assigned;

IT IS ORDERED that the weekly reports received by this Court from the Louisiana Department of Public Safety and Corrections relative to current status of the defendant be filed into the record in this case as Court Exhibit #1 in globo and based on said reports it is further ordered that Doctors Aris Cox and Theresita Jimenez are hereby appointed and directed to further examine the defendant relative to his current mental status and appear in this Court on the the 30th day of September, 1988, at 11:00 o'clock a.m. to give their testimony relative to their findings;

IT IS FURTHER ORDERED that the January 21, 1988, ex parte order in re delegation of decision making authority be vacated and set aside;

IT IS FURTHER ORDERED that pursuant to R.S. 15:830.1 the Department of Public Safety and Corrections provide psychiatric treatment and medication as deemed appropriate by the medical staff of said Department to the defendant up to and until September 25, 1988, when a

final determination of this issue will be made by this Court; IT IS FURTHER ORDERED that subpoenas issue to Doctors Cox and Jimenez to appear in Court on September 30, 1988, at 11:00 o'clock a.m. for the taking of their testimony and that copies of this order be mailed to all counsel of record with a copy being served on the defendant.

Judgment rendered August 26, 1988, in Open court at Baton Rouge, Louisiana.

Judgment read and signed this 31st day of August, 1988, in Chambers at Baton Rouge, Louisiana.

L.J. HYMEL, JUDGE

19TH JUDICIAL DISTRICT COURT

Filed: Aug 31, 1988

19TH JUDICIAL DISTRICT COURT
Parish of East Baton Rouge
State of Louisiana

EXCERPTS FROM TESTIMONY TAKEN AT
SEPTEMBER 30, 1988 HEARING

DR. KAY KOVAC

[RECORD—P. 717]Q What—when you went and spoke with him that ten or fifteen minutes on the 26th, this past Monday, what did you talk about and what did he say?

A Well, I initially just went back and introduced myself again to him since it had been a long time since I had seen him. And we talked just in general. I asked him how he was feeling and I told him I was—my main reason for coming over was my concern that he was not taking his oral medication. I asked him, you know, how he had been doing in general and he said okay, sleeping a lot. Uh, he did say that occasionally he heard some voices. And I said, well, perhaps if you started taking your medication again that that would help and he said no. And then he went on to say that his attorney had instructed him not to take the medicine. And I said, well, you know, I understand but I think just for your best health we really need to talk about this because I think it's in your best health to take your medicine. And, uh, Mr. Perry said, no, my attorney has told me not to take my medicine. He said, it's just—it's very simple to understand, take my pills and die, don't take my pills and live. And he said, so, I'm not going to take my pills. [RECORD—P. 718] So I just—I said, well, you know, you've got an injection that's going to be coming up. And he said, no, I'm not going to take my injections any more either. And I asked him about that and he said that they made his hip burn. And I told him, well, perhaps

we could, you know, talk with one of the psychiatrists and maybe that was not the—we could give him a different medication. And he said, no, my attorney said this is going to go to the supreme court. And he said, I'm just not going to take any—I don't want any injections, I don't want any other medications. And. . .

* * *

A I'm not a psychiatrist and I don't pretend to have any indepth knowledge on what I think would work on Mr. Perry or not.

* * *

[RECORD—P. 724] Q Michael's affect and delusional status can vary from day to day, can it not?

A It depends on—just in my limited experience with Michael, it depends on whether he had taken his medication.

* * *

[RECORD—P. 736] DR. ARIS COX:

Q You examined Mr. Perry again on September 7th of this year.

* * *

[RECORD—P. 737] Q And you were aware of the fact that he had been given an injection of Haldol on September the 3rd of 1988, is that correct?

A Yes, sir.

Q And you saw him four days later on the 7th?

A Yes, sir.

Q As best you can recall, would you explain or tell us exactly what you did and how Mr. Perry appeared and how the conversation went?

A I pretty much had the standard conversation I had with Mr. Perry when I see him. I asked him how he was doing, uh, again went into his circumstances with him, asked him to talk to me about his situation.

Q What do you mean by circumstances and situation?

A His awareness—well, number one, how he's doing, day to day how he's feeling, what's going on with him, etcetera. I specifically asked him—I was told the weekend before I saw him, he had been upset and I had to go to the hospital for an emergency injection of medication. I questioned him about that. I then talked with him about his understanding of his position on death row, why he was there and the implications of his situation. Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me he had been having hallucinations, voices, as he described it, [RECORD—P. 738] over the weekend which had bothered him and that caused him to create too outbursts that led to him going to the hospital. I noticed several times during the interview when discussing his situation, his possible execution, the crimes for which he was convicted, he burst into periods of laughter which would interrupt our conversation. And I'd wait for him to compose himself and then he would start talking again. His thought processes were disorganized. He indicated to me that he was still hallucinating. My conclusion was that he was getting worse, even on the medication. And I suggested to the staff that the dosage of medication would have to be increased. It was my impression, however, that he was aware of the fact that he was under a sentence of death, that the process of elec-

trocution could kill him and that he was aware of why he was on death row. As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the Bennett criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation.

* * *

[RECORD—P. 740] Q Dr. Cox, you have seen Mr. Perry on occasions prior to this where he was on medication, is that not correct?

A Yes, sir.

Q And on those—on some of those occasions isn't it a fair statement that he was not competent to be executed on those, at those times?

A I have seen him, yes, sir, when he indicated that he did not feel that the electrocution process could kill him.

Q And the prior testimony that you gave at the April, 1988 hearing concerning Mr. Perry being a, quote, moving target, close quote. . .

A Yes, sir.

Q . . . is still viable in your opinion today?

A Yes, I do, I believe that.

* * *

[RECORD—P. 742] Q What's the effect for the period of effectiveness for a short-term?

A Eight to ten hours at the most.

Q And your examination was approximately how many hours after the short-term medication?

A I saw him on the 7th and this was the weekend before. I saw him on a Wednesday and it was on a Saturday or Sunday when this was given him.

Q And to your knowledge was there any other short-acting or other oral medications he received between the 3rd of September and the 7th of September?

A He is supposed to be on oral Haldol daily in addition to the long-acting medicine he is given. The records indicate that he was refusing that. And, to me, there is always an issue of compliance or question about compliance with prisoners on death row when they're given oral medication.

Q And speaking of the oral medication, Dr. Cox, I understand from his medical information available at the hospital that he was to have a standing order of sorts for IM medication with Haldol?

A The long-acting Haldol he was to receive two cc's every month on around the 10th of the month, the 10th or 11th, or something, every month, once a month. That medicine is given once a month.

Q And do you know what precipitated that standing order or upon whose order that was?

A I think it was ordered by Dr. Abase who is not a consulting—Abade, rather, a consulting psychiatrist at Angola, who evaluated Mr. Perry and ordered this medication.

[RECORD—P. 743] Q Now this two milligrams or two cc's. . .

A Two cc's, yes, sir.

Q Two cc's of Haldol which is what we call the long-lasting medication, what is long lasting? What's the period?

A This medicine can be given every month and given that way it will produce a circulating blood level, a therapeutic blood level that will last a month if the proper dosage is given. This drug people can take it monthly and get effective treatment from it if the dosage is proper.

Q Okay. And you mentioned blood level, and I'd like to follow up by asking once you get a long-lasting injection of Haldol-D how long does it take for you to reach a plateau of sorts where you may, to use my terminology in layman words, stabilized?

A Three months with that drug.

Q And why is it, Dr. Cox, that we have in Mr. Perry's case oral medications which are assigned to supplement apparently this intramuscular injection he receives?

A I don't believe he's been on an intramuscular for three months. And even if he has it's obvious he's not on enough medication, so he needs the supplement to control his symptoms.

Q Okay. Why do you give a supplement on a daily through orals as well as the monthly injection?

A Well, that's standard procedure with this medication that when you begin a person on Haldol long-acting for the first three months its accepted procedure to use a supplement of oral medication until the patient does reach a plateau after three months at which point they [RECORD—P. 744] can be maintained on the long-acting only. It's in the prescribing information with the medicine.

Q That would be the Physician's Desk Reference?

A Um-hum.

Q Now what would happen if, assuming that you take your IM injections for the three month period that you don't supplement it with the orals on a daily basis?

A The person would stay ill longer, be harder to control their symptoms, they would remain psychotic longer.

Q Now is there a way to stabilize a patient through injections only where you have a patient that's unable to ingest medication through the oral means?

A It's difficult. It would mean probably having to give the patient the medication not only in long-acting injectable form but short-acting injectable form, also.

Q That would be short-acting when they manifest the symptoms?

A Yes, or daily, you know, we have written protocols to treat people with IM medication if they refuse if by mouth, two or three injections a day.

[RECORD—P. 745] A I directly asked him if electrocution would kill him and he said yes, he knew it would. I asked him if he understood that he was under a sentence of death, if that was his understanding and he said yes.

* * *

Q The last time you were in this court, Dr. Cox, your testimony was that he does respond to medication when he is on it.

A Yes, sir.

Q Your opinion is still the same on that?

A Yes, sir.

Q When he's on medication he's competent and when he's not on medication he's not competent. Is that still your opinion?

A That's basically it, sir.

Q Let me ask you some questions to maybe educate me a little bit in this area. This Haldol that's being or has been given by way of injection and by use of some type of oral medication, this is what's called an antipsychotic drug, is that correct?

A Yes, sir, that's correct.

Q Are there any other type of lesser controversial drugs, such as, tranquilizers or sedatives that would enhance or assist Mr. Perry in maintaining competency?

A No, sir, I believe that he needs to remain on the class of drugs known as antipsychotic drugs. That's specific class in pharmacology.

[RECORD—P. 746] Q Now in the literature in cases I've come across I've seen that there are two common side effects of antipsychotic medications, those being, and I may be pronouncing this wrong, akinesia. . .

A Yes, sir.

Q . . .and akathisia.

* * *

Q Now the akinesia had the effect of making a person, according to the cases I've read, apathetic and unemotional?

* * *

Q Have you seen any side effects of Mr. Perry. . .

* * *

Q . . .in that way?

A I have never seen Mr. Perry have side effects.

Q The second side effect, akathisia, that supposedly makes a person agitated and restless?

* * *

Q Have you seen him have any of those effects from the medication?

A It's hard to say. In my opinion, no.

* * *

19TH JUDICIAL DISTRICT COURT

Parish of East Baton Rouge

State of Louisiana

**EXCERPTS FROM TESTIMONY TAKEN AT
OCTOBER 21, 1988 HEARING**

* * *

DR. JIMENEZ:

[RECORD—P. 753] A I talked to him regarding his—the reason why he's incarcerated, and what possible—what, what is the conviction that he had. And he was able to indicate to me that he was there because he was convicted of first degree murder of five people and that he was going to be executed because of this.

Q Now, were you aware of the fact that he had had an injection of, ah, what I'll call, ah, the long-term, long-affecting Haldol on September 3rd?

A Yes, sir, I did. He received Haldol Decanoate 2 CC IM September the 3rd, 1988. He had been sporadically taking his medication. Apparently, after that, the Haldol by mouth, but three days before I saw him he had completely refused to take his medication by mouth.

Q Now, my notes indicate that he was given oral short-term Haldol on September 11th, which would have been two days before your September 13th examination, do your notes reflect that?

A What I have, sir, is that Haldol ten milligrams, refusing very often, took once in three days; that would be pretty close, what you have.

Q And at the time that you saw him on September 13th, was he psychotic?

A No, sir. He was pretty stable, based on my examination and evaluation.

Q All right. Let's move on to September 26th, did your examination take place in the same area [RECORD—P. 754] of the prison?

A Yes, sir. The same place, and I asked him the same questions, and he told me that I've asked those questions several other times in the past. And, again, I told him again that I still needed to hear him repeat to me what he's there for and what he thinks is going to happen to him, and he was able to do so.

Q Was he psychotic on September 26th, in your opinion?

A No, sir, he was not.

Q And at that time, his last medication injection would still have been September 3rd, is that correct?

A That's right, sir.

Q And at that time, on September 26th, did he understand that he was facing the death penalty?

A Yes, sir. He said: Five counts of murder, I already told you that. That penalty, electric chair for first degree murder.

Q Did you have a discussion with him about whether or not he was going to take his medication or not?

A Yes, sir. He said that he was told by his lawyer not to take his medicine, the judge wants me to take the medicine so I could be executed. My lawyers, ah, you have you said you have, ah, my lawyers said you have a famous case here, it might go to the U.S. Supreme Court, is what he said.

* * *

[RECORD—P. 755] Q In fact, Haldol-D is a long-lasting psychotropic?

A That's true, sir. The effect usually lasts from three-to-four weeks.

* * *

[RECORD—P. 758] Q And could you describe for us his orientation on both of those days of interviews?

A He was aware of where he was at. He was aware that it was the month of September. And he didn't exactly know the date, but he was aware that it's September and 1988. He talked about things that he had seen. I asked him what—how he usually spent his time, and sometimes, he said, lying in bed sometimes, or sometimes he watched the t.v. show, and he talk about having seen a program about Charles Manson, and he was—he voiced some concerns about the picture and his opinions about that show.

Q Did he indicate, what show it was he was watching?

A It was about a show by *Geraldo*, and it was on Charles Manson, and he was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed and why, why he, who only killed five people should be executed.

* * *

[RECORD—P. 759] Q Do you recall on—did he express to you any wishes or information on how he felt concerning his penalty of death that he faces?

[RECORD—P. 760] A He told me that when first he was told that he was going to die, he said, well, I'm going to die, I'm going to die, but he told me that as the time come closer, he starts feeling scared. In fact, he said: I'm

scared, scared to die. And he, during my last visit had—I expressed to him how I feel about having to go there so often to evaluate him, I said: It's not really a pleasure coming here talking to you all the time and asking you these things. And he said: Don't feel bad about it, you're just doing your job. And he said that he does not think about dying because it drives him crazy to think about, about about.

* * *

[RECORD—P. 761] THE COURT: Does the Defense have any other evidence?

MR. NORDYKE: Your Honor, this was not a hearing—

[RECORD—P. 762] THE COURT: I understand. My question is: Do you wish to present any evidence?

MR. NORDYKE: No.

THE COURT: I want to give you the opportunity.

MR. NORDYKE: No, Your Honor.

THE COURT: Does the State have any evidence?

MR. SOLOMAN: No, sir, Your Honor, we do not.

* * *

19TH JUDICIAL DISTRICT COURT
Parish of East Baton Rouge
State of Louisiana

ORAL REASONS FOR JUDGMENT
FROM THE 19TH JUDICIAL DISTRICT COURT
OCTOBER 21, 1988

* * *

[RECORD—P. 766] BY THE COURT:

Michael Owen Perry was indicted on five counts of first degree murder. After a change of venue, he was tried here in the Nineteenth Judicial District Court, Parish of East Baton Rouge, and the jury unanimously concluded the defendant was guilty as charged on all five counts.

After completion of the sentencing-portion of the trial, that same jury unanimously recommended defendant to be sentenced to death on each count.

It is not necessary to go through the facts of the case at this time, because they are succinctly stated by the Louisiana Supreme Court in *State versus Perry*, 502 So. 2nd, 543, Louisiana Supreme Court, 1986, at Page 546 and 547.

As early as 1897, the Louisiana Supreme Court has held that "... one who has committed a capital offense and becomes non compos mentis after conviction, he shall not be executed." *State ex rel Paine versus Potts*, 22 So. 738 (La. 1897).

[RECORD—P. 767] In *State versus Allen*, 14 So. 2nd, 870, Louisiana Supreme Court, 1943, the Supreme Court of Louisiana reaffirmed that one who has been convicted of a capital crime and sentenced to suffer the penalty of death and who, thereafter, becomes insane cannot be put to death while in that condition.

At Page 563 and 564 of the *Perry* decision itself, our current Louisiana Supreme Court stated that the State of Louisiana will not execute one who has become insane subsequent to the conviction of a capital crime. The Court then directed counsel for the defendant to apply to this court for appointment of a sanity commission to make a determination as to whether or not this defendant is competent for execution.

This proposition attained constitutional status in *Ford versus Wainwright*, 106 Supreme Court, 2595, 1986. In that case, the United States Supreme Court held that "... the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane."

In *Ford versus Wainwright* the court never made a determination as to the competency of the defendant to be executed. Instead, the Court dealt with the Florida statutory scheme which specifically provided for the situation where a prisoner that has been given the death penalty becomes insane or incompetent. The Court ruled that the procedures set forth in the Florida scheme were constitutionally [RECORD—P. 768] deficient under the 14th Amendment to the United States Constitution. The *Ford* court suggests many constitutional boundaries for procedures to be used in determining a person's sanity or competency, yet, no guidance was offered as to the constitutional limits or what standard is to be applied in making the ultimate determination.

An excellent discussion of *Ford versus Wainwright* is contained in Volume 47 of the *Louisiana Law Review* at Pages 1351 through 1364.

As stated by Justice Powell in his concurring opinion in *Ford versus Wainwright*, there are two issues for determination: Number one, the meaning of insanity in the

context of competency for execution, and; number two, the procedures to be followed. As stated by Justice Powell, the goal is to require that those who are executed know the fact of their impending execution and the reason for it. Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, Justice Powell would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

[RECORD—P. 769] In *Lowenfield versus Butler*, 843 Fd. 2nd, 183, Fifth Circuit, April 12, 1988, the United States Court of Appeal for the Fifth Circuit relied heavily upon Justice Powell's concurring opinion, as set forth in the *Ford* case. Justice Powell's concurring opinion, as stated in the *Lowenfield* case, is the most recent and possibly only statement on the status of Louisiana law in this area, since *Lowenfield* was a Louisiana prisoner. The ultimate issue of *Lowenfield*'s competency to be executed was not decided by the Fifth Circuit because the court held that *Lowenfield* failed to make a substantial threshold showing that he could produce evidence that his mental infirmities were so severe as to meet the standard to trigger the hearing process.

As the *Paine*, *Allen* and *Ford* cases illustrate, the fact that this right exists is not in dispute in these proceedings. The issues arise as a result of the fact that there appears to be no articulable standard by which to judge the competency of a person to be executed under Loui-

siana law. In the *Ford* decision, the United States Supreme Court noted in a footnote that twenty-six states have statutes explicitly requiring the suspension of the execution of a prisoner who meets the legal test of incompetence. Louisiana has no such express statute. Instead, Louisiana's ban against execution of the incompetent has become law by judicial decision.

Under Louisiana criminal law—digressing for a moment—Under Louisiana criminal law, we have [RECORD—P. 770] three types of mental incapacities: First, there is "insanity". Article 14 of the Criminal Code provides that if the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from the criminal responsibility. This statutory mental incapacity originated from English common-law and jurisprudence; namely, the *McNaughten* case.

The second type of mental incapacity deals with a person's competency to stand trial. This incapacity is set up by statute in Article 641 of the Code of Criminal Procedure, which provides that mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense. Subsequent articles of the Code of Criminal Procedure then provide for the manner in which the incapacity is raised, orders for mental examinations, appointment of sanity commissions, reports of sanity commissions and the determination of mental capacity to proceed. Again, however, these statutes are supported and further refined by our jurisprudence; namely, the Louisiana Supreme Court case of *State versus Bennett*, 345 So. 2nd, 1129, Louisiana Supreme Court, 1977, wherein all the criteria are listed

there for determination of a defendant's mental capacity to proceed in a criminal prosecution.

[RECORD—P. 771] The third type of mental incapacity is now before this Court; that is, the mental capacity to proceed to execution.

Since there is no express statement by the Legislature on this subject, it appears that it will be necessary to fashion a standard through analogy with Louisiana's existing statutes and state and federal jurisprudence. This analogy will necessarily take us into the procedural scheme that should be utilized in determining the competency of an individual for execution.

In the *Allen* case, decided by the Supreme Court of Louisiana on November 8th, 1943, we are referred there to the applicable statutes. In referring to Article 267 of the Code of Criminal Procedure, which was Act 136 of 1932, which is the predecessor of our current Code of Criminal Procedure, Article 641, the Code said that that Article of the Code relates to mental capacity and proceedings before or during trial and before conviction and prescribes the rule to be followed by the trial judge to determine the defendant's mental condition. The Court then makes the following statement: It said nothing about the proceedings to be followed in a case where a person becomes insane after conviction and sentence. But, for the same reason that a person is entitled to a hearing before conviction on the question of his sanity, he is entitled to a hearing after conviction; *and the same rules of procedure govern.*—And I emphasize the words, “and the same rules of [RECORD—P. 772] procedure govern”.

At Page 564 of the *Perry* decision itself, the current Louisiana Supreme Court again refers us to the articles of the Code of Criminal Procedure by stating that “... the

allegation of mental incapacity may be raised by the court or the prosecutor. And, therein, the Supreme Court cited Article 642 of the Louisiana Code of Criminal Procedure.

Therefore, procedurally, it appears we are governed by the Code of Criminal Procedure, and, therefore, do have a set of statutes to work with.

Article 641 of the Code of Criminal Procedure provides that the defendant must suffer from a mental disease or defect in order to raise his sanity or competency. Article 642 allows defense counsel, the district attorney or the court to raise the issue. After the issue is raised, or I should say: After the issue was raised in this case, this Court appointed doctors to serve on a sanity commission, and they were ordered to examine the defendant, have done so, have made their reports and have been called to testify relative to their findings. Article 647 provides that the issue of the defendant's mental capacity is ultimately a determination to be made by the court in a contradictory hearing. This determination is being made by this Court today.

Should this Court determine that the defendant is [RECORD—P. 773] competent for execution, by whatever tests this Court deems to be applicable, then the proceedings shall resume and the case shall proceed to the next step, which is the scheduling of an execution date.

However, if this Court determines today that the defendant lacks the mental capacity to proceed, by whatever tests this Court deems appropriate, the proceedings shall be suspended and the Court shall commit the defendant to the custody of the Department of Health and Human Resources for custody, care and *treatment*—and I emphasize and underline the word “*treatment*”—as long as the lack of capacity continues. In this particular case,

the defendant would be maintained in custody at the Forensic Unit at the Feliciana Forensic Facility, in accordance with Article 648 of the Code of Criminal Procedure.

Article 649 then provides that if the review panel, as set forth in Article 648, at anytime thereafter recommends that the defendant presently has the mental capacity to proceed, the Court shall hold a contradictory hearing within thirty days on that issue, and if ruled competent, the case shall then proceed to the next step. I should mention that Article 649 has been amended by Act 383 of 1988, and, essentially, that new Act replaces the review panel with the superintendent of the facility. But, substantively, there's no change in the law, just that change in the procedure.

[RECORD—P. 774] Article 649.1 of the Code provides that when a person is returned to the committing Court from an institution and the institution deems it necessary that the patient receive *prescribed medication*,—and, again, here, I underline and emphasize the words “*prescribed medication*”—it shall be the duty of the chief administrative officer of the Parish Jail to make such medication available to the person until such time as the Coroner, or other physician, finds that the medication or its prescribed dosage is no longer necessary. As such, it is obvious from these statutes that a criminal defendant can be maintained medically for purposes of competency.

“Is a defendant whose mental capacity is maintained only through the use of a prescribed medication competent to stand trial?” *State versus Hampton*, 218 So. 2nd, 311, Louisiana Supreme Court, 1969. In the *Hampton* case, the defendant was suffering from chronic paranoid schizophrenia. At the sanity hearing, the two members of the commission reported that the defendant was legally

sane and that she could understand the proceedings and assist in her defense. They attributed her improved condition to the use of a psychotropic tranquilizing drug known as “Thorazine”. One psychiatrist testified that her psychotic symptoms were in remission, but if the dosage was discontinued, she would probably relapse. It was the consensus of medical opinion that the defendant was legally sane due to the medication, or I should say “legally competent” due to the medication. In approving of competency [RECORD—P. 775] maintained through the use of prescribed medication, the Louisiana Supreme Court made the following observation, and I quote:

“... that this condition has resulted from the use of a prescribed tranquilizing medication is of no legal consequence. Under the codal test, the court looks to the condition only. It does not look beyond existing competency and erase improvement produced by medical science. . . .”

In *State versus Plaisance*, 210 So. 2nd, 323, 1968, the defense argued that if it were not for sedatives that the defendant was taking, he would not be able to stand trial, and that his state of remission was due only to the influence of said drugs. Medical evidence at the trial indicated that the defendant was only able to understand the proceedings against him and assist in his defense because of the continued use of the prescribed medication. The Louisiana Supreme Court went on to hold that the defendant was competent to stand trial even though he was taking tranquilizers at the time.

In *State versus Kaysen*, 464 So. 2nd, 793, Louisiana Appeal Fifth Circuit, 1985, the defendant there argued that he was prejudiced by being forced to proceed with trial despite the fact he had been prescribed and administered a certain drug while in prison prior to trial. The

Fifth Circuit held that the effect of the drug was actually to help the defendant to understand the proceedings and to assist counsel in his own defense, and, therefore, [RECORD—P. 776] the trial judge did not abuse his discretion in denying the defendant's motion for mistrial on the theory that the defendant in a drugged-state was not competent to stand trial.

The case of the tranquilized defendant is discussed at 28 Louisiana Law Review, 265, 1968; I realize that this is an old Law Review article, but I feel that some of the comments from it are pertinent to the court's inquiry today. In this Law Review note, the writer discusses the nature and effect of psychotropic drugs. The antipsychotic drugs belong to a group called "Phenothiazines" of which Thorazine and Compazine are the most common. These drugs can reduce hallucinations, delusions and other abnormalities in the mentally ill. They do not otherwise effect cortex; that is, the "thinking" part of the brain. The mental clarity or consciousness of the person remains unchanged. In effect, these drugs cause a remission of the psychosis; if the drugs are discontinued, this latent psychosis will return. This language from the Law Review article appears throughout the literature that this Court has read, and appears throughout the medical testimony presented in this case. As stated by the writer in the Law Review article, whether it is the state or the defendant who seeks to avoid trial, the legal issue is the same.

As to the nature of chemotherapy, Dr. F. H. Metz, Clinical Director of the Forensic Division at the East Louisiana State Hospital in 1986 (sic), he [RECORD—P. 777] describes the effect of tranquilizing drugs at Page 268 of the Law Review article, as follows, and I quote:

"... I believe it is highly significant that the courts and the district attorney and all concerned should

recognize that tranquilizers are antipsychotic or anti-anxiety medication . . . are not drugs in the sense that they drug or cloud the consciousness or senses of an individual, and that they are not habit-forming or addictive and are not classed as sedatives like the barbiturates, and they are not classed as narcotics. Certainly, the district attorney will want to note this and thus may prevent the possibility of an accused or convicted defendant seeking relief . . . on the grounds that he was drugged or doped or sedated at the time of his earlier hearing or trial."

The author then concludes that the fact that the defendant is taking medication should not preclude his trial. The objective application of the medically maintained defendant will enable the state to proceed against the defendant who is seeking to avoid or postpone his trial, and will not prevent the defendant who wants to stand trial from becoming the "forgotten man" of the law.

In summary, Louisiana statutes and cases both hold that competency to stand trial can be achieved through the use of treatment and medication.

The next issue then is if a person is found to be incompetent for execution, by whatever tests is deemed appropriate by this Court, can medication be used to achieve competency in this area?

[RECORD—P. 778] There are a number of recent federal cases dealing with the use of psychotropic drugs:

In *Rennie versus Klein*, 653 Fd. 2nd, 836, 3rd Circuit, 1981, the federal court there held that ". . . mental patients—and in this case, it involves mental patients, as opposed to defendants in criminal proceedings, the case holds that . . . "mental patients who are committed involuntarily to state institutions nevertheless retain a constitutional right to refuse antipsychotic drugs that may have perma-

nently disabling side effects. The state may override that right when the patient is a danger to himself or others, but in non-emergency situations, must first provide procedural due process." In this case, Rennie was admitted after an involuntary commitment proceeding was had, and he was diagnosed as a paranoid schizophrenic. This civil litigation focused exclusively on motions for preliminary injunctions with respect to the right to refuse treatment. At Page 843 of the decision, the Court states that the physical effects that antipsychotic drugs might have sets forth the physical effects that antipsychotic drugs might have on an individual. And at this point, I do want to note that Dr. Cox's testimony, which was taken on September 30th, indicated to this Court that Mr. Perry has not suffered from any of these side effects because of his taking the Haldol. The Court went on to hold that the protection of liberty embodied in the due process [RECORD—P. 779] clause of the 14th Amendment includes a right to refuse administration of antipsychotic drugs. The State may compel such medication in the face of a patient's refusal to accept it only by demonstrating either that the medication is necessary to prevent a danger to the patient or to others in the community, or that the patient does not have the mental capacity to determine for himself his course of treatment. The majority opinion also added to this constitutional measurement considerations of "least restrictive treatment" and risk of side effects. In a concurring opinion by Circuit Judge Garth, he disagreed with the majority as to these last two considerations. In his opinion, he felt those last two considerations, that is, least restrictive treatment and risk of side effects were irrelevant considerations.

The next case reviewed by this Court was *Osgood versus District of Columbia*, 567 Fd. Sup. 1026, the U.S.

District Court, District of Columbia, 1983. In that case, a former jail inmate brought suit under the Civil Rights Statute as a result of her being forcibly injected with a psychotropic drug against her own will. In this particular case, the plaintiff objected to the medication on the basis of her Christian Science beliefs. During the entirety of her jail-stay, her refusal to submit to medication was honored except for one afternoon on June 4, 1980, where she was forcibly injected with Haldol against her will because of actions of the defendant which the doctors considered a medical emergency. She was then administered an injection of five milligrams [RECORD—P. 780] of Haldol upon order of the jail doctor. Finding factual disputes, which negated the previous summary judgment order, the case was remanded for resolution of issues of fact. The Court made the following observations, and I quote:

"A compelling state interest will justify actions of the type at issue in the instant case that infringe constitutional rights only where there is no reasonable alternative action that is less instructive upon those rights."

"... plaintiffs rights under the free exercise and due process clause to refuse drug therapy are not absolute."

"... clear interests, either on the part of the society as a whole or at least in relation to a third party would justify overriding a plaintiffs right under the free exercise clause. ."

"... absent some interest on behalf of society or a third party, the state police power cannot be invoked to impose a program of drug therapy on a person, when to do so would violate that person's free exercise rights. ."

"Plaintiffs rights under the due process clause to refuse treatment, likewise, are not absolute."

In *Ake versus Oklahoma*, 105 Supreme Court 1087, 1985, the U.S. Supreme Court dealt with the issue as to whether or not the Constitution requires that an indigent defendant have access to psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question. The Court answered this in the affirmative. In this decision, the U.S. Supreme Court appears to approve the trial of a [RECORD—P. 781] defendant whose competence is maintained through the use of antipsychotic drugs. At a competency hearing, the Court heard medical testimony that Mr. Ake was psychotic and that his diagnosis was that of paranoid schizophrenia-chronic with exacerbation. The Court then found him to be mentally ill and ordered him committed to the state mental hospital. Six weeks later, the chief forensic psychiatrist informed the Court that Mr. Ake had become competent to stand trial and was receiving two hundred (200) milligrams of Thorazine three times daily, and the psychiatrist indicated that if Mr. Ake continued to receive that dosage, his condition would remain stable. Again, this testimony is similar to the testimony that I've heard presented by Dr. Cox and Dr. Jimenez and the other doctors that were called to testify. The state then resumed proceedings against Mr. Ake after the Court found him to be competent for trial. Although Ake's death sentence and conviction were reversed, the reversal was based on the trial court's failure to appoint a psychiatrist to assist the defendant on the issue of his sanity at the time of the commission of the offense.

In *United States versus Charters*, 829 F.d. 2nd 479, 4th Circuit, 1987, Charters appealed a district court order permitting medical personnel at a federal correctional

institution to medicate him with antipsychotic drugs over his objection. Charters had been found incompetent to stand trial and was ordered confined to federal custody, and upon the [RECORD—P. 782] government's motion, the district court decided to permit forcible medication after weighing Charters interest in liberty and privacy against the interest of the government. The Fourth Circuit Court of Appeal reversed that holding.

At Page 484 of the decision, the court makes the following comment:

"... we then turn to the question of forcible medication. We conclude that a mentally ill *pretrial*—and I emphasize and underline the word "*pretrial*"—... we conclude that a mentally ill pretrial detainee has a constitutionally protected interest in deciding for himself whether to accept or forego medical treatment."

The court then stated that we must balance the particular interest of the individual and the governmental interest implicated by the case before us. The Court recognizes that the right to refuse medical treatment has been specifically recognized as a subject of constitutional protection.

The following quotations are pertinent for our review here today:

"... the threat to the government's interest in safety and security must be manifest. Therefore, unless it is determined that, without medication, a patient presents an immediate threat of violence that cannot be avoided through the use of less restrictive alternatives, there is no justification for the intrusion into fundamental liberties that forcible medication presents... Less restrictive alternatives such as segregation or the use of less controversial drugs, like tranquilizers [RECORD—P. 783] or sedatives,

should be ruled out before resorting to antipsychotic drugs.—In this case, Dr. Cox testified that in his opinion there were no lesser controversial drugs that would be of benefit to the Defendant Perry in this case— . . . The existence of the less intrusive alternative, forcible medication of Charters, cannot at present be justified based on the need to prevent violence.”

The *Charters*’ Court then went on to say that:

“ . . . It is questionable that the government’s interest in having a fair trial would be realized by trying a heavily medicated defendant.—Again, this is not a consideration in this case, since we are not concerned with a trial at this point— . . . The government’s interest—going on from the *Charters*’ case— . . . The government’s interest is in a fair trial in which the accused’s guilt or innocence is correctly determined . . . Two common side effects of antipsychotic medication are Akinesia and Akathisia. The first makes the defendant apathetic and unemotional. The second makes him agitated and restless. As a result, the jury may be misled by the demeanor of a defendant who appears to, to care about the crime (or the victim) or who appears overly anxious at particular moments.”—Again, as I’ve said, this is not a consideration in the case before this court today.

The *Charters*’ Court then discusses rules and guidelines relative to a medically competent patient versus a medically incompetent patient. The Court states that the lower court should evaluate whether Charters has followed a rational process in deciding to refuse antipsychotic medication and can give rational reasons for the choice he has made. Should Charters refuse antipsychotic medication because he believes that the risk of the side effects and the possibility of permanent injury outweigh the possible benefits of that medication to him, it will be [RECORD—P. 784] difficult for him to be found incompe-

tent by virtue of that judgment. However, if he refused medication out of a denial that he suffers from schizophrenia, or out of a belief that the drugs will have effects that no rational person could believe them to have, then perhaps he would be medically incompetent.

At Page 499 of the *Charters*’ decision, the Court then says:

“ . . . We limit our ruling to the case presently before us. It is possible to envision circumstances different from those here, in which the government’s interest would be sufficiently compelling to override a patient’s decision to refuse treatment.

Then, in Footnote 30, the Court says:

“We address only the circumstances of the unconvicted defendant and express no views concerning the rights of convicted prisoners facing forcible treatment with antipsychotic drugs.”

From the *Paine*, *Allen*, *Perry* and *Ford* decisions, it is unequivocal that one who has been convicted of a capital crime and sentenced to suffer the penalty of death and who thereafter becomes “insane” or “incompetent” cannot be put to death while in that condition. The manner in which the issue is raised in Louisiana is governed by Code of Criminal Procedure, Articles 641-and following.

The test for competency for execution in Louisiana [RECORD—P. 785] appears to come from the *Ford* and *Lowenfield* decisions, which set forth a two-pronged test for competency for execution. Under this test, which this Court hereby adopts, the State is prohibited from executing those who are unaware of the punishment they are about to suffer and why they are to suffer it.

At the hearing held in this matter some months ago, Drs. Jimenez, Cox, Vincent and Estes were called to

testify, having previously been appointed by this Court to serve as members of the Sanity Commission.

It was Dr. Jimenez's opinion at that previous hearing that Mr. Perry understands what he is convicted of and the penalty he is to suffer and the reason for it. She testified that he understands he killed his family members, and he additionally understands that he does not want to die for that offense. He indicated to Dr. Jimenez that she was there to help him stay alive.

Dr. Cox felt that on March 3rd, 1988, when he last saw Mr. Perry, before that hearing, he was competent to be executed, but at that time he was on prescribed medication, the antipsychotic drug, "Haldol".

It should be noted that Drs. Jimenez and Cox have served on previous sanity commissions involving [RECORD—P. 786] Mr. Perry, and, therefore, have benefit of prior examinations, his history, etc. As such, this Court gives their testimony more weight than the other doctors who were called as witnesses and who were getting involved in this matter for the first time.

All doctors that testified agree that Mr. Perry is suffering from a disorder known as "Schizoaffective Disorder". As Dr. Cox stated in his testimony, this disorder is always there; there is no cure for it. Additionally, it is hard to predict when he will be affected or not affected. Dr. Cox did state, however, that the defendant does respond affirmatively to medication when he is on it.

Dr. Cox reiterated that on March 3rd, 1988, while on Haldol, the defendant was competent to know the fact of his impending execution and the reason for it. Also, on March 3, 1988, he was of the opinion that the defendant was legally sane; that is, he knew the difference between right and wrong. In summary, Dr. Cox's testimony at that

time was that when Mr. Perry is on medication he's competent; when he is not on medication, he is not competent.

Dr. Curtis Vincent, pursuant to a ninety-minute interview with the defendant, concluded that the defendant was psychotic in March, 1988, and was not competent for execution. Dr. Vincent further suggested that treatment should include medication. [RECORD—P. 787] He indicated that the defendant understands the fact of his impending execution, but the more serious question in his mind is whether the defendant understands the reason for it. It is quite obvious that the defendant does not want to die, according to Dr. Vincent.

Dr. Glen Estes was called as a witness and also diagnosed the defendant as suffering from "Schizoaffective Disorder", and that symptoms will show indefinitely. Dr. Estes would offer or suggest no treatment program for the defendant. Dr. Estes has only seen the defendant on that one occasion, that was on March 9, 1988, and at the time of the interview, he did not know whether or not the defendant was on medication or not.

The continuation of this hearing was had on September 30th, 1988. At that time, Dr. Kay Kovak was called as a witness, and Dr. Cox was called as a witness again. Dr. Kovak, of course, is the Medical Director at Angola. And she indicated that she spoke with the defendant on September 26th, 1988, approximately four days before the hearing. This was a ten to fifteen minute conversation relative to the defendant's refusal to take oral medication. I'm not going to go through her testimony relative to the conversation that she had with him, but according to her testimony, the defendant had been sleeping a lot, appeared to be doing okay, although, he was hearing voices. He also indicated to her that his attorney told him

not to take the medication, and he [RECORD—P. 788] said he wasn't going to take the injection. On September 29th, 1988, she visited the defendant again briefly. At that time, he appeared coherent. He did not appear delusional. Again, he indicated he would not take the medication. On cross-examination, Dr. Kovak indicated that the condition of the defendant varies from day-to-day, depending on whether he is on his medication. On cross-examination by Mr. Solomon, she indicated that when the defendant does not take his medication, he goes into psychotic episode. When he is on medication, it's her opinion he is competent. According to Dr. Kovac, this is the statement the defendant made to her. Perhaps it sums up the entirety of all these hearings and all of this law and all of this testimony. According to her, he said: It's very simple. If I take the pills, I die. If I don't take the pills, I'll live.

Dr. Cox was next called as a witness on September 30th. It was his opinion that the Haldol dosages needed to be increased. It's his opinion that under the *State versus Bennett* criteria, the defendant is not competent. It's his opinion, further, that the defendant is competent for execution if maintained on Haldol. It's Dr. Cox's opinion that the defendant should be on a daily oral medication and a monthly long-term injection. It's his feelings and his belief that the defendant would be stabilized after three months of such medication.

[RECORD—P. 789] Called today as a witness, Dr. Jimenez—and it appears that her statement today is essentially in line with the testimony that she gave at the previous hearing—that is, that he understands what he is convicted of and the penalty he is to suffer and the reason for it. It's her statement that he understands he killed

those family members and he doesn't want to die because of it.

From the testimony adduced, and from the *Ford* and *Lowenfield* tests, it is obvious to this Court that the defendant is competent for execution. It is further obvious from the testimony that he is competent only while maintained on psychotropic medication in the form of Haldol.

Therefore, do the rights of this defendant to refuse this medication, thereby making himself incompetent, outweigh the rights of the State to administer medication for purposes of maintaining the competency of the defendant for purposes of execution?

The federal cases previously cited list various considerations for the Court to consider in making this ultimate determination.

In the *Rennie* decision, the Court stated that the State may override the right of a mental patient to refuse antipsychotic drugs when the patient is a danger to himself or others, but must provide [RECORD—P. 790] him with procedural due process. It's obvious in this case that this defendant has been provided with procedural due process. In the *Rennie* case, the Court was dealing, however, with a mental patient who had been committed involuntarily to a state institution. The court was not confronted with a person in Mr. Perry's legal position today.

In this *Osgood* case, the Court there again stated that a compelling state interest will justify actions of forcible use of Haldol where there is no reasonable alternative action that is less intrusive upon those rights. Again, that court states that the right to refuse medication under the free exercise and due process clause are not absolute. And, again, it's Dr. Cox's testimony in this case that there is no

reasonable alternative action available to achieve competency of the defendant.

In the *Ake* decision, the U.S. Supreme Court appears to approve the trial of a defendant whose competency was maintained through the use of antipsychotic drugs. The drug used there was Thorazine, and the medical testimony indicated that if Mr. Ake continued to receive that medication, his condition would remain stable.

In the *Charters* case, the Court stated that there are instances that can be envisioned in which the government's interest would be sufficiently compelling to override a patient's decision to refuse treatment. [RECORD—P. 791] The Court then distinguished the circumstances of the unconvicted defendant versus the convicted prisoner facing forcible treatment with antipsychotic drugs, and expressed no views on the latter.

The citizens of the State of Louisiana through their Legislature have enacted the death penalty for certain crimes. The citizens of Louisiana heard this case through the jury.

Mr. Perry is no longer a person surrounded with the veil of the presumption of innocence. He has been found guilty by a jury of his peers and has been sentenced by them accordingly to suffer the ultimate punishment.

And it is felt by this Court that Louisiana's interest in the execution of that jury's verdict override those rights of Mr. Perry. The State is entitled to have that judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurpation of the criminal laws in this area, which were enacted by State Legislature.

For these reasons, it is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer, and he is aware of the reason that he is to suffer said punishment. [RECORD—P. 792] Since the defendant's competency is achieved through the use of antitropic or antipsychotic drugs, including Haldol, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection.

Judgment is hereby signed accordingly.

MR. NORDYKE: Your Honor, I respectfully object to the ruling of the court, and, of course, would like the Court to note that the stay is still in effect, as I understand it, on the forcible medication issue.

THE COURT: I'm not certain if the stay is in effect or not. I'm not certain if it was in effect until the date of this hearing or not. But, in any event, I will grant a stay order —

MR. NORDYKE: Thank you.

THE COURT: —if you so request it.

* * *

[RECORD—P.318]

19TH JUDICIAL DISTRICT COURT

Parish of East Baton Rouge
State of Louisiana

NUMBER 9-85-472, SECTION V

[Caption omitted in printing]

ORDER

This matter came before the court this date pursuant to regular assignment on defendant's request for a competency hearing for determination as to whether or not he possesses sufficient mental capacity to proceed to execution. Present in Court for the State of Louisiana was Rene Salomon, Assistant Attorney General, the defendant, Michael Owen Perry and his counsel, Keith Nordyke, June Delinger and Joe Giarrusso, Jr.

After considering the evidence adduced in the form of written reports and documents filed herein and the oral testimony of the witnesses presented, for oral reasons this date assigned:

IT IS ORDERED that the defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment.

IT IS FURTHER ORDERED that defendant's competency is achieved through the use of antitropic and antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said

Department and if necessary to administer said medication forcibly to defendant and over his objection.

JUDGMENT READ, RENDERED AND SIGNED in Open Court at Baton Rouge, Louisiana, on this 21st day of October, 1988.

/s/ L.J. Hymel, Judge
L.J. HYMEL, JUDGE
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

Filed: Oct 21, 1988

THE SUPREME COURT OF THE STATE OF LOUISIANA

 No. 88-KD-2239

 STATE OF LOUISIANA
 v.
 Michael Owen Perry

IN RE: Perry, Michael Owen;—Defendant(s); Applying for Supervisory/Remedial Writs; Parish of East Baton Rouge 19th Judicial District Court Div. "J" Number 9-85-472

May 12, 1989

Denied.

WFM

JCW

HTL

LFC

DIXON, C.J., CALOGERO & DENNIS, JJ., would grant the writ.

Supreme Court of Louisiana

May 12, 1989

/s/ _____
 Clerk of Court
 For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

 No. 88-KD-2239 and
 No. 89-KA-0159

 STATE OF LOUISIANA
 v.
 MICHAEL OWEN PERRY

IN RE: Michael Owen Perry, applying for Rehearing of this Court's Order of May 12, 1989; 19th Judicial District Court, Parish of E. Baton Rouge, Division "J", No. 9-85-472.

June 16, 1989

Rehearing denied.

WFM

JCW

HTL

LFC

DIXON, C.J., CALOGERO & DENNIS, JJ., would grant.

Supreme Court of Louisiana

June 16, 1989

/s/ _____
 Clerk of Court
 For the Court

Supreme Court of the United States

No. 89-5120

MICHAEL OWEN PERRY,

Petitioner

v.

LOUISIANA

**ON PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Louisiana.**

ON CONSIDERATION

of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that this motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 5, 1990

MAY 24 1990

In The
Supreme Court of the United States
October Term, 1989

MICHAEL OWEN PERRY,

Petitioner,

VERSUS

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Louisiana

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW
ISSUES PRESENTED

- I. Does the Eighth Amendment prohibit a State from forcibly injecting an insane death row inmate with mind-altering drugs when:
 - A. Such drugs are not being used for treatment but are administered solely in an attempt to make him competent to be executed;
 - B. The medication order does not permit the exercise of medical judgment;
 - C. The medication order gives no consideration to side effects or to the inmate's treatment needs;
 - D. The medication order permits no abatement of the medication even if it does not succeed in making the inmate competent; and
 - E. The inmate's medical history shows that, even with medication, he continually decompensates and his competency is at best transitory?
- II. Does the use of medication to achieve competency for execution violate the Eighth Amendment when no state permits the use of medication for this purpose and when the majority of states place limits on the use of medication for non-treatment purposes?
- III. Is this order a violation of the Fourteenth Amendment in light of Louisiana's law which prohibits the execution of the insane, requires that insane inmates be *treated* and prohibits the use of medication for non-treatment purposes?

QUESTIONS PRESENTED FOR REVIEW
ISSUES PRESENTED (Continued)

- IV. Is this order a violation of the Fourteenth Amendment in that it considers only the State's interest in carrying out its sentence and fails to consider the inmate's interest in avoiding the forcible administration of psychotropic drugs?
- V. Is this order a violation of the Fourteenth Amendment in that the trial court relied on hearsay and opinion evidence, provided to the court *ex parte*, without being subject to cross-examination?
- VI. Does Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399 (1986) create an adequate standard for measuring competency to be executed? Should the test of competency to be executed also require that the record demonstrate some measure of stable and predictable competency? Should the test also require that the inmate be able to assist counsel when the inmate has post-conviction remedies available to him?
- VII. Is an inmate competent to be executed when he suffers from an incurable, major psychotic illness and his comprehension is at best relative and fleeting even while under medication?

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CITATIONS TO OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming, on direct appeal, Petitioner's conviction and sentence of death is reported at 502 So.2d 543 (La. 1986), *cert. denied*, 484 U.S. 872 (1987) and is reproduced in the Joint Appendix (J. A.) at 1-44.

The denial of petitioner's application for appeal or in the alternative writ of certiorari to the Louisiana Supreme Court on the question of forcible medication is reported at 543 So.2d 487 (La. 1989) and is reproduced at J.A. 150. The denial of petitioner's application for rehearing to the Louisiana Supreme Court is reported at 545 So.2d 1049 (La. 1989) and is reproduced at J.A. 151.

The remaining orders and rulings raising the questions presented for review are not published but are reproduced in the Joint Appendix. These include:

1. August 26, 1988 ruling, overruling defendant's objection to the use of *ex parte* materials submitted to the Court by the Louisiana Department of Corrections and ordering that such materials be entered as evidence. (J.A. 111-12).
2. October 21, 1988 reasons for judgment ordering forcible medication to achieve competence (J.A. 126-47).
3. Court's October 21, 1988 judgment ordering forcible medication (J.A. 148-49).

JURISDICTIONAL STATEMENT

This application seeks review of a judgment of the Louisiana Supreme Court, entered May 12, 1989, denying petitioner's appeal and alternative application for writ of certiorari. Petitioner's timely application for rehearing was denied June 16, 1989. Petitioner's Application for

Writ of Certiorari to this Honorable Court was granted on March 5, 1990.

The statutory ground for jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth Amendment which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

the Sixth Amendment which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and have the assistance of counsel for his defence.

the Fourteenth Amendment which provides in relevant part:

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Louisiana statutes and portions of the Louisiana Code of Criminal Procedure. These are set out in the Appendix to this brief.

STATEMENT OF THE CASE

Michael Perry suffers from schizoaffective disorder, a major psychotic illness. He has hallucinations and delusions. His thinking is disordered and tangential. His speech is rambling and incoherent. His behavior is bizarre and at times he is disoriented and does not know where he is. His emotional swings range from acute

depression and crying to manic hyperactivity and paranoia.

Perry's history of mental illness begins long before this crime. The first record of a diagnosis of schizophrenia was made during the process of a civil judicial commitment on March 23, 1981. The examining physicians found that he suffered from schizophrenia, had no insight into his illness, and may not know right from wrong. (Def.Ex.4 at 10,11; R. 543,544). That same day, Michael was civilly committed to Central Louisiana State Hospital. *Id.* at 11. Michael eloped from the hospital on April 13, 1981 and was returned shortly thereafter. *Id.* at 21. During this admission he showed delusional thinking and paranoid ideation. See generally Def.Ex.4 at 25-60; R. 543,544. He was discharged on May 22, 1981, with the diagnosis of paranoid schizophrenia. *Id.* at 5, 15 and 16.

On September 10, 1981, Michael was again judicially committed to Central State Hospital. *Id.* at 101. He was diagnosed again as paranoid schizophrenic. This admission was prompted by Michael's mother who gave a history of Michael's bizarre behavior such as burning his clothes and living in his automobile. *Id.* at 117. He again eloped on the day of admission. *Id.* at 108.

In 1983, Michael was arrested for murdering his mother, father, two cousins, and a nephew. After indictment, Michael's competence to stand trial was questioned. In October 1983, he was committed to Feliciana Forensic Facility (hereinafter "FFF") based upon an order of the trial court finding him incompetent to stand trial. See Judgment of October 5, 1983. Def.Ex.3, R. 542,543.

Michael was delusional upon admission. "[He felt he] doesn't have enough blood" and was hearing voices. Robots, the President and the CIA were telling him what

to do. The robots told him to kill his family. He exhibited manic behavior and pressured speech. He complained of being fed body parts and stated that if shot in the head, it would not kill him. *Id.* at admission interview.

Delusional thinking continued throughout his hospitalization. He believed his parents were still alive, that other patients wished to kill him and that a patient bit Michael's tongue. (Def.Ex.3 at progress note, December 22, 1983; progress note, December 8, 1983; progress note, November 17, 1983; R. 542,543). He explained the murders as a need to break all Ten Commandments and that this was the last commandment that "he had to break". *Id.* at progress note, November 10, 1983; psychiatric exam, October 28, 1983; progress note, October 11, 1983. Two days later Michael denied even being in Louisiana at the time of the murders. *Id.* at progress note, October 13, 1983.

The shifting nature of Michael's disease is illustrated by comparing the progress notes of November 16 and November 17, 1983. On the 16th, the note indicates no hallucinations and that he was not psychotic. The next day, Michael was seen by Dr. Jiminez and found to have shaved his eyebrows to increase the oxygen to his brain. *Id.* at progress notes, November 16, 17, 1983. On November 18th, Dr. Jiminez found him delusional and paranoid. On November 23rd, the notes indicate that his behavior was "unpredictable".

In November 1983 a psychological evaluation was completed. Dr. Curtis Vincent concluded that Perry was not malingering and that a true psychotic defect existed. His diagnosis was schizoaffective disorder. Dr. Jiminez confirmed the diagnosis of schizoaffective disorder in a January 5, 1984 progress note.

His delusional thinking does not cease even upon discharge from FFE. Dr. Jiminez noted in the final progress note that "this patient is delusional and has to be placed on medication". She further notes that because of side effects, Michael had been taken off psychotropic medications. (Def.Ex. 3 at progress note, March 16, 1984 R. 542,543).

On March 16, 1984, Dr. Jiminez found Michael still delusional but "able to give his rights as a defendant and the nature of the charges against him." *Id.* at Dr. Jiminez progress note, March 16, 1984. Michael was returned to court and found to be competent in March, 1984 (R. 8). He was tried and convicted in October, 1984. After conviction and upon being sentenced to death, he was sent to Louisiana State Penitentiary on December 20, 1985.¹

From the first day, the prison physicians were aware of his mental condition. He was placed on extreme watch to rule out psychosis and Haldol 5 mg was ordered three times daily. (Def.Ex.5 at inpatient medical chart; progress note December 20, 1985; R. 544,545). He was discharged from the hospital on December 24 on a dosage of Haldol 10 mg three times daily. *Id.* at Discharge summary December 24, 1985.

By December 31 he "present[ed] a picture of reactive psychosis, characterized by confused thinking, grandiose delusions of being God, . . . [and] acting out behavior. His affect was disproportionately euphoric. . . . He doesn't

¹ Michael's records from LSP are found at Def.Ex. 5, R. 544, 545. These records were introduced in the same order in which they were provided to counsel by LSP. Although the order is generally chronological (with the latest records at the beginning of the second volume), numerous pages are out of order.

seem to present a danger to himself or others." *Id.* at doctor's progress note December 31, 1985. He was admitted to the hospital on January 11 and Haldol 10 mg was continued three times daily. *Id.* at Doctor's progress notes, January 25, 1986.

The medication charts show that he was given Haldol 5 mg three times daily from January 29 to March 11. By February 24, he was completely silent or talked only in monosyllables. He slept in excess of twenty hours per day. *Id.* at mental health progress notes, February 24, 1986.

By April 14 he was "disoriented . . . he didn't know both his specific or general location (Camp J and [LSP]). Affect was flat . . . disclaimed hallucinations and no systematic delusions noted. Doesn't appear overtly psychotic". *Id.* at progress note April 14, 1986. However, by April 22 he was admitted to the hospital for forced medication. He showed "psychotic symptoms . . . clearly manic, marginally oriented". *Id.* at hospital summary, April 22, 1986. Haldol 10 mg twice daily was ordered. *Id.* at Doctor's order, April 24, 1986. This continued until May 1 when the dosage was changed to 10 mg three times daily. *Id.* at inpatient medical chart. He was discharged on May 6 and continued on 10 mg three times daily until June 9 when the dosage was changed to 5 mg three times daily. *Id.* at inmate medical chart. He remained on this dosage throughout June and July. *Id.* at inmate medical chart.

On July 29 the staff began monitoring him for consideration of forced medication. *Id.* at progress note, July 29, 1986. On August 12, mental health found that he "may be decompensating". *Id.* at progress notes, August 12, 1986.

On September 9-10, he was "disordered" and decompensating but "was not as yet a danger". *Id.* at progress notes, September 9, 10, 1986.

By September 11 he had decompensated: "This inmate was brought to the ER as a culmination of several weeks of decompensation. He was placed on Mild Watch last night in anticipation of a total break which appears to have now occurred. He is in my opinion presently unable to function outside a hospital setting." *Id.* at progress note, September 11, 1986. Haldol was increased to 10 mg three times daily. *Id.* at doctor's order, September 11, 1986. Although he refused medication from September 15-23, on September 20, the psychiatrist found that the "psychosis had cleared". *Id.* at progress note, September 15, 1986; doctor's notes, September 20, 1986. He was discharged on September 26 with a prescription for 10 mg Haldol three times daily for a month. *Id.* at doctor's order, September 26, 1986.

On October 4 when the mental health team attempted to interview, he "went berserk, an uncontrollable, psychotic rage state. . . . At times he was . . . disoriented as to place and person." *Id.* at progress notes, October 4, 1986. During this admission to the hospital he was "howling, laughing inappropriately. His behavior was bizarre". The doctor ordered 30 mg of long-lasting Haldol D. *Id.* at doctor's order, October 7, 1986. On October 17 he was "alert, oriented, no . . . gross mental impairment." (*Id.* at progress report, October 17, 1986 R. 544,545). He was discharged on October 20 as "stable" with a prescription of 10 mg of Haldol three times daily.

By October 27, he was hearing voices and his affect was inappropriate. Haldol 10 mg three times daily was

ordered. *Id.* at psychiatric/psychological evaluation, October 27, 1986. On October 31, he was having rapid mood swings and stated that he was facing "1000 years of real life". *Id.* at progress notes, October 31, 1986.

In January 1987 Michael was seen by the mental health team because security had reported that he was "disruptive . . . yelling and screaming". The social worker concluded that he was not actively psychotic at that time. *Id.* at progress note January 2, 1987. But on February 5, 1987 he was hospitalized as "gravely disabled". *Id.* at physician's emergency certificate February 6, 1987. He was disoriented, manic, and suicidal. He exhibited bizarre behavior, hallucinations, poor insight, and poor judgment. *Id.* at physician's emergency certificate February 6, 1987; progress notes, February 5, 1987. On February 5-6, 1987, Michael was given 300 mg of Thorazine and 50 mg of long-lasting Haldol D. *Id.* at inpatient medication record, February, 1987. Dr. Guiterrez ordered 50 mg of Haldol D to be repeated in four weeks. *Id.* at doctor's notes, February 6, 1987; management order, February 5, 1987.

On February 9 he was still decompensated but was not considered a danger. *Id.* at progress note February 9, 1987. But on February 10 he was again observed to exhibit bizarre behavior and he was talking to himself. *Id.* at progress note February 10, 1987. He remained in the hospital until February 13. In a follow-up on February 16, he was described as "apparently in good remission" with "no overt pathology". *Id.* at progress note, February 16, 1987.

This "remission" did not last. On March 4, 1987, he was "decompensating" with "manic-like behavior", "yelling, raving, incoherent . . .". *Id.* at progress notes, March

4, 1987. Although Dr. Guiterrez had ordered 50 mg of Haldol, when the next injection was due, the dosage was increased to 100 mg to be repeated monthly for four months. *Id.* at emergency room note, March 11, 1987. On April 10, 1987, he was found to have delusions centering on Olivia Newton-John. He also "gave a very delusional story about how his parents . . . had left him \$200,000.00". *Id.* at progress note, April 10, 1987.

Haldol D was given on April 13 and the oral Haldol was continued at 10 mg three times per day. *Id.* at inpatient medication record April, 1987; emergency room note. By April 15, he was "actively psychotic" and was hospitalized. *Id.* at progress notes, April 13, 1987. Haldol D was increased to 200 mg and on April 19 the oral Haldol was increased to 20 mg three times per day. *Id.* inpatient medication record, April, 1987; progress notes, April 19, 1987. During this stay he was hallucinatory and delusional, had inappropriate affect and exhibited bizarre behavior. *Id.* at progress notes, April 15-20, 1987. For example, on April 21, he "said the toilet told him it was hungry so he threw soap in it". *Id.* at management order, April 21, 1987.

April 24 he was discharged from the hospital. A follow-up on April 28 described him as hyperactive but "basically intact". *Id.* at progress notes, April 28, 1987. Michael refused medication on May 9 and 13 but he was "still basically oriented". *Id.* at progress notes, May 13, 1987. Yet on May 14 he was hospitalized with "manic-like behavior, rapid speech, elevated mood, some tangential thinking". *Id.* at progress notes, May 14, 1987. He was placed under extreme watch and in restraints until his discharge on May 18. *Id.* at management orders May 15-18, 1987.

Medication was continued through May and the order for Haldol D 100 mg was renewed for four months on June 6. *Id.* at emergency room note, June 6, 1987. By July 2 he was again exhibiting bizarre behavior, hallucinations, and heightened affect but "no . . . intervention [was] seen as needed". *Id.* at consultation, July 2, 1987. On July 2, 100 mg of Haldol D was given, along with 10 mg of Haldol twice daily. *Id.* at emergency room note, July 2, 1987. However, when Dr. Cox saw Michael on August 7 he "conclude[d] this man is psychotic and exhibits signs and symptoms of chronic schizophrenia. Believes he is God and cannot be killed by electrocution". *Id.* at consultation, August 7, 1987.

In September, Michael believed he was God, that he had killed Adam and Eve, and that he makes \$20,000.00 per year. *Id.* at progress note, September 5, 1987. On September 15, Dr. Cox found he is "still psychotic . . . I continue to doubt his competency to assist in appeals process". *Id.* at consultation, September 15, 1987. Dr. Cox renewed the July order for 100 mg Haldol D. *Id.* at consultation, September 15, 1987.

In October, he was "on Haldol 10 mg B.I.D. but he remained psychotic. Is loose, disorganized, delusional and hallucinating. Still believes he cannot be killed, stated he is a CIA agent and believes he is supernatural." *Id.* at consultation, Dr. Cox, October 28, 1987. He demanded that his foot be cut off. This demand was prompted by instructions from a worm which he swallowed as a child. *Id.* at sick call, November 5, 1987.

By November 12, he had decompensated and was hospitalized again. "[H]e appears to have been taking medication but is floridly psychotic". *Id.* at admit note, November 12, 1987. His symptoms were manic behavior,

flight of ideas, hyperactivity, and sleeplessness. *Id.* at admission report, November 12, 1987; progress notes, November 12, 1987. On November 16 he was "quiet, cooperative, alert and well oriented". He was discharged that day. *Id.* at discharge summary, November 16, 1987. On November 20 Dr. Cox reported that "Michael is in good remission and is better than I have seen him" and removed him from medication. *Id.* at progress consultation, November 20, 1987.

By November 30, he had again decompensated and was hospitalized. *Id.* at consultation, Dr. Cox, November 20, 1987. Medication was renewed on November 30 with an immediate dosage of 10 mg and continuing dosage of 10 mg twice daily. *Id.* at doctor's order, November 30, 1987. The dosage was increased to 20 mg twice daily on December 2. *Id.* at doctor's order December 2, 1987. Michael was delusional, disoriented, hallucinating, hyperactive, yelling, paranoid and impaired in memory. *Id.* at progress notes, November 30, 1987; physician's notes, November 30, 1987. He had the delusion of being haunted, the Mafia was pouring water on him, threatened to kill with thunderbolts, and repeated the familiar refrain that he is God. *Id.* at progress notes, December 3-6, 1987.

On December 23 he was reported as improved and he was discharged on December 28 on 20 mg twice daily. *Id.* at progress note, December 23, 1987; discharge summary December 28, 1987. On December 30 "security officers . . . report Perry is functioning well". *Id.* at progress report, December 30, 1987. However, the next day, he was readmitted to the hospital as "decompensated . . . delusional, confused, not oriented. *Id.* at progress note, January 1, 1988. He was walking into walls, crying, and

complaining that the devil was stabbing him with a fork. *Id.* at emergency room note December 31, 1987; progress notes January 2, 1988. Haldol 10 mg STAT and 10 mg twice daily was ordered. *Id.* at doctor's orders, December 31, 1987. This was increased to 30 mg twice daily on January 6. *Id.* at nurse's notes January 6, 1988.

He was released on this dosage on January 27 and a follow-up reported that he was aware of his execution and that death is fatal. *Id.* at consultation, Dr. Cox, January 27, 1988. Yet two days later he was hollering, delusional, and was convinced that Dr. Cox was trying to kill him. *Id.* at mental health notes January, 29, 1988.²

In 1987, the Louisiana Supreme Court heard Michael's case on direct appeal. While affirming the conviction and sentence, the Court encouraged the state, court, or defense counsel to inquire into Michael's current mental state and competency to be executed:

The State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime. *State v. Allen*, 15 So.2d 870 (La. 1943). No state imposes the death penalty on the insane. *Ford v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for an appointment of a sanity commission to make such determination. Indeed, the allegations of

² The medical records from LSP end in January, 1988 as this was the point at which the prison delivered the records to the trial court for the upcoming hearing.

mental capacity may be raised by the court or the prosecutor. La.Cr.P. art. 642.

(J.A. 43) (*State v. Perry*, 502 So.2d 543, 563-64 (La. 1986)).

On January 14, 1988, the trial court ordered such a hearing. The court appointed three psychiatrists³ and a psychologist⁴ to examine Michael (J.A. 46). Each expert interviewed Michael between January and April, 1988.

On April 20, 1988, the experts testified on their findings (R. 498-659). At the outset, the court stated the purpose of the hearing:

[T]he purpose of this hearing today is that under the Supreme Court decision in this case . . . , the Louisiana Supreme Court . . . said that the State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime The Supreme Court then steered defense counsel to apply to the trial court for appointment of a sanity commission to make such a determination. (R. 500).

The court also found:

[T]he Louisiana Supreme Court further indicated that the defendant bears the burden of proving and providing the trial court with reasonable grounds to believe he is presently insane. In order for the Court to even commence these proceedings, I am satisfied that the defendant has gone forward with that . . . (J.A. 70).

³ Dr. Aris Cox, a board certified forensic psychiatrist and consulting psychiatrist at LSP (R. 546-549); Dr. Theresita Jiminez (R. 596-98); and Dr. Glenn Estes, a Board Certified psychiatrist in private practice (R. 636).

⁴ Dr. Curtis Vincent, a clinical psychologist and former acting Chief Psychologist at FFF (R. 580-84).

The experts unanimously agreed on the diagnosis of schizoaffective disorder (R. 511, 550, 592, 639), an illness which Dr. Jiminez defined as:

[A]n illness wherein the patient has a problem with thinking disorder and at the same time with his feeling tone or the defective [sic, affective] component. When they are in the state of acute illness they are usually very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would [be] manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the schizophrenic component of the illness. (J.A. 70-71).

Schizoaffective disorder is a major mental illness which is incurable. Although the symptoms may get better, the illness is still there. (R. 513). This condition directly affects the patient's judgment and thinking:

[I]f you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. (R. 514)

Sometimes you would think that you are somebody that you are really not. And that's like when you think you are God. (R. 514)

When Dr. Jiminez evaluated Michael on February 4, 1988, she found that:

[H]e indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. (R. 511, 516)

He also talked about his lawyer had not defended him very well because he was a member of the mafia. (R. 511)

[He has] delusion of thinking. Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association. (R. 515)

I indicated that at the time I examined Mr. Perry he was not competent, and I felt that he would not be able to assist his lawyer in his own defense. I also indicated that I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die. (J.A. 70)

Dr. Jiminez also testified about Haldol, the drug which Michael had been given at LSP: "[Haldol is] a psychotropic medication. It's supposed to get the thinking process more delusiveness [sic], more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid." (R. 519). As to the effectiveness of Haldol in stabilizing Michael's thinking, Dr. Jiminez testified that she was concerned about Michael's ambivalence or inconsistency in his thinking:

My apprehension with him is he does get ambivalent and he knows - he's aware that he is on death row because he's going to die. He's aware that he killed his family and he will tell you he did. But he does get very ambivalent and gets very paranoid and that's a part of his illness.

Q (by the State): Is there a medication that you're aware of that can eliminate ambivalence in personality?

A: No. It's the extent of the ambivalence that we are concerned about. And that is a part of the illness in Schizophrenia so I thought that maybe

if he could become more stabilized then maybe there will be less ambivalence on his part.

Q: How are we to stabilize him when there are no medications that eliminate ambivalence?

A: Well, that's the problem. (J.A. 75-76)

The second psychiatrist to testify was Dr. Aris Cox, a forensic psychiatrist who consults at LSP and who has seen Michael on numerous occasions (R. 550). Based on his visit with Michael on March 3, 1988, Dr. Cox concluded:

Q. Have you formulated an opinion as to whether or not Mr. Perry is competent to be executed?

A. Well, as you and I have discussed, that is a relative thing. It has to do with the treatment Mr. Perry is receiving. I have seen him at times when I did not feel he was competent to be executed. I have seen him also at times when I thought he was competent to be executed.

Q. Is there any way to predict when he is competent?

A. When I saw him the last time which was on the 3rd of March he was on neuroleptic medication. He was about as - he was functioning about as well then as I've ever seen him function. At that time I went through the whole matter with him and he was aware of why he - of where he was, what his sentence was, what he would be executed for and was aware of the fact that he could be executed.

Q. Are there other times where you've seen him when he was not competent to be executed?

A. I have. The first time I saw him I didn't think he was competent, back in July.

Q. Any other times since then?

A. Yes, sir. (J.A. 78-79).

...

Q. . . . [I]t appears to me that Mr. Perry is hospitalized quite frequently. Why is that?

A. He becomes psychotic and is hospitalized by the staff there so he can be given medication and treatment.

Q. When he becomes psychotic is he in contact with reality?

A. In my opinion, no, sir.

Q. Is he competent to be executed during those periods?

A. No, sir. (J.A. 80)

...

Q. Doctor, out in the hall you indicated that Michael was, quote, at best a moving target. Would you explain to the court what you meant by that?

A. I have seen him on and off medication several times now and I have seen him respond to medication. . . . He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. (J.A. 81-82).

...

Q. Doctor, you've also, I believe, seen him when he's undergone this forced treatment, have you not?

A. Yes, sir.

Q. And even after the forced treatment and massive doses of Haldol and he's still floridly psychotic?

A. He gets better. . . . He does respond to medication when he's given it and he gets better. How good he gets probably does leave something to be desired but he gets better.

...

I don't think I've seen Michael, even on medication, be completely coherent, well integrated,

rational. I've always felt in him there's areas of psychotic thinking there.

Q. Even on his best days?

A. Yes, sir, even when I have seen him on his best days.

Q. With massive doses of medication?

A. Yes, sir. (J.A. 83-84)

Two days after Dr. Cox saw Michael, Dr. Vincent interviewed him. His conclusion was that Michael was psychotic and not competent to be executed (J.A. 89). Dr. Vincent found Michael "[V]ery tangential with me, that is, that I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked about something completely irrelevant." (R. 590-91). He was delusional, said he was God and had problems with his contact with reality and his consistency. (R. 619). "[H]e was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders. . . . And that was very inconsistent. He was also very tangential, he had some difficulty paying attention. . . ." (R. 629). Dr. Vincent agreed that Michael is a "moving target". (R. 594).

Regarding Michael's understanding of his sentence:

Q: (By the court): In March when you interviewed him did you have occasion to discuss with him the death sentence, the electric chair? . . . What is - or was his understanding of that at that time?

A. . . . I asked him directly what happens if all the doctors go to court to the hearing and the judge finds him competent to proceed, and he indicated at that point that he would be executed. So there was some understanding that if he's found competent to proceed that he would be executed.

Q. And he knows what that means? He knows what execution is? . . .

A. Yes, he expressed some fear of dying in relationship to that.

Q. Now in your discussions did he appear to understand the reason that he was going to be executed?

A. That's a much more difficult issue. I think he has the understanding that if an individual murders somebody and they can be found guilty and then could be executed legally. . . . I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

Q. Did he acknowledge that he committed these murders to you or did he deny it?

A. He did both. At one point he admitted that he committed the murders. . . . Two minutes later I was asking another question and he said that he felt that he could be found innocent because he was in Washington D.C. at the time. (R. 623)

The final expert, Dr. Estes, interviewed Michael on March 9, 1988 and described him as:

His symptoms included disruptive behavior, physical activity, restlessness, interrupting and ignoring questions, indirectness and irrelevancy in his answers, inconsistency in his explanations, tendency to be disorganized when he presented facts, difficulties in presenting facts in chronological order, variations in the pace of his speech, jumping from one topic to another in his ideas, inappropriate moods, indication of having his thoughts broadcast out loud, indication of hallucination of voices, saying that he was God, failure to consistently recognize whether or not he was mentally ill, tendency not to acknowledge responsibility or his role in determining the actions of others toward him. (J.A. 95).

From these observations, Dr. Estes concluded:

It's my opinion that he was not completely aware of the nature of the proceedings against him even though he was able to acknowledge that he was on death row when I saw him, and at that time he was able to say that they want me dead, but I did not conclude that he understood his sentence, his punishment for what he did was wrong.

Q. What about the finality of a death sentence . . . ?

A. . . . [H]e failed to acknowledge that because on some occasions when I was talking to him when I saw him he referred to his eventual release from prison. I'm not sure of what the basis of that was but he referred to it as a future event. (J.A. 93)

In addition to the experts' testimony, Michael testified (R. 962-88) and a videotape of his testimony is in evidence (attached as an exhibit to petitioner's application for writ of certiorari filed July 13, 1989). After this evidence and the introduction of Michael's medical records, the defense rested. The State also rested after presenting no evidence or witnesses (J.A. 97). The court set the ruling for May 26, 1988 (R. 692). This date was later changed to August 26, 1988 (J.A. 48)

Between April and August, 1988, the State began supplying the trial court with reports about Michael. The impetus for these reports is not clear. However, defense counsel was not informed of or copied on these transmittals. These reports consist of a page from Michael's medical records (J.A. 104-05), a handwritten note (J.A. 106), and opinions from state employees who had not been called as witnesses in April 1988 (J.A. 100-02).

On August 26, 1988, the Trial Court introduced these *ex parte* reports into the record over objection of defense counsel, stating:

Those reports were filed at my request, or sent to this Court by my request. The defense counsels' objection to the Court reviewing these documents is overruled and the Court will file those documents into the records. And the Court has considered those reports. . . .

[B]ased on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jiminez to re-examine the defendant relative to his competency as set by the Louisiana Supreme Court in the original Michael Owen Perry decision. (R. 698-700)

The court then set a hearing for September 30, 1988 and "Pending that hearing, pursuant to R.S. 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant as to be determined by the medical staff of the Department of Public Safety and Corrections." (R. 701). "I want it [forcible medication] done until at least September the 30th . . . when I will make a final determination on the issues." (R. 702). The court also prohibited the filing of any further briefs except to cite new cases that might be published between August and the September hearing. (R. 702).

Defense counsel objected to introduction of the weekly reports, to the order to forcibly medicate Michael, and to the lack of a hearing on the issue of medication. Counsel also sought a stay of the medication order. All of these were denied. (R. 703).

Michael sought writs of certiorari to the Louisiana Supreme Court. The Supreme Court stayed the medication order (R. 305). However, Michael was medicated on September 3, 1988 (R. 741).

On September 30, 1988, the trial court called as its witness Dr. Kay Kovac, a family practitioner who is the Medical Director of LSP. Dr. Kovac had talked to Michael for about ten to fifteen minutes on September 26, 1988. (R. 741). She described him as appropriate and not delusional (R. 718) although he did say that he occasionally heard voices. (R. 717). Because her job is primarily an administrative one, Dr. Kovac has not seen Michael frequently (R. 723). She was aware of the existence of antipsychotic medication but, because she is not a psychiatrist, had no in-depth knowledge of whether these would work for Michael (R. 718).

Dr. Cox also testified about an interview he had with Michael on September 7, 1988. Michael had been in the hospital on the weekend prior to that interview and had received an injection of Haldol (R. 737). Even with this injection, Dr. Cox found:

Basically, I found that Mr. Perry was worse than he had been the last time I saw him. He indicated to me that he had been having hallucinations, voices, as he described it, over the weekend which had bothered him and that caused him to create outbursts that led him to go into the hospital. . . . His thought processes were disorganized. He indicated to me that he was still hallucinating. *My conclusion was that he was getting worse, even on the medication.* And I suggested to the staff that the dosage of medication would have to be increased. It was my impression, however, that he was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and

that he was aware of why he was on death row. As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the *Bennett* criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation. (J.A. 115-16) (Emphasis added)

Dr. Cox believed that his "moving target" description of Michael's competence was still viable (J.A. 116).

Dr. Jiminez was not available to testify in September but she was called on October 21, 1988. She saw Michael on September 13 and 26. (R. 752). She found him "pretty stable" (R. 753-54). He stated that he was aware of the crime and the death penalty (R. 754). However, Dr. Jiminez acknowledged that this stability was solely the result of the Haldol (R. 761).

Immediately following Dr. Jiminez's testimony, the court rendered its order:

[I]t is obvious to this Court that the defendant is competent for execution. It is further obvious from the testimony that he is competent only when maintained on psychotropic medication in the form of Haldol. (J.A. 145)

[M]ichael Owen Perry[] is mentally competent for purposes of execution, and that he is aware of the punishment he is about to suffer and is aware of the reason that he is to suffer said punishment. Since the defendant's competency is achieved through the use of antitropic [sic] or antipsychotic drugs, it is further ordered that the Louisiana Department of Public Safety and Corrections is to maintain the defendant on this medication as to be prescribed by the medical staff of said Department, and, if necessary, to administer said medication forcibly to defendant and over his objection. (J.A. 147)

Michael Perry then sought writs of certiorari and alternatively, an appeal to the Louisiana Supreme Court. Review was denied on May 12, 1989 (J.A. 150). Rehearing was denied on June 16, 1989 (J.A. 151). Michael Perry then sought writs of certiorari to this Honorable Court. His application was granted on March 5, 1990 and is reported at 110 S.Ct. 1317 (1990).

SUMMARY OF ARGUMENT

1. The medication which the trial court ordered for Michael Perry is not treatment; it is a step toward his execution and part of his punishment.
2. The doctors at Louisiana State Penitentiary have been treating Michael Perry for years. This order to forcibly medicate Michael goes beyond the treatment that has been administered in the past and permits no exercise of professional medical judgment.
3. Michael Perry has a history of developing side effects as a reaction to psychotropic medication. This order does not consider potential side effects or permit termination of the medication if side effects develop.
4. Michael Perry has received psychotropic medication in the past. This medication has not been successful in achieving sustained or predictable competency. Yet the order does not permit termination of the medication even if it does not work.
5. The Eighth Amendment and contemporary standards of human decency prohibit the use of forced medication solely to create competency to be executed.
6. Louisiana has no statute, case law or policy permitting the use of forced medication to create competency to be executed. Neither the Legislature nor the Supreme

Court of Louisiana has authorized the type of order which the trial court has entered for Michael.

7. No state executes the insane. The majority of states commit an insane inmate for *treatment*. The majority of states place limits on the use of forcible medication and medication for non-treatment purpose. This consensus shows that the trial court's order to forcibly medicate to create competency for execution violates the Eighth Amendment.
8. Louisiana law prohibits the execution of the insane and requires that insane inmates be *treated*. Louisiana law also defines the conditions under which an inmate can be forcibly medicated. These laws create expectations which are protected by the Due Process Clause of the Fourteenth Amendment. By ordering Michael Perry medicated for non-treatment purposes, the trial court has violated Michael Perry's rights under the Due Process Clause.
9. The trial court's order to forcibly medicate Michael considered only the State's interest in carrying out its sentence. It did not balance this interest against Michael Perry's interest in avoiding the non-consensual administration of psychotropic drugs. This order, therefore, fails to accord Michael Perry the minimal protections guaranteed by the Fourteenth Amendment.
10. The process by which the trial court reached its decision violates the Sixth and Fourteenth Amendments. Louisiana law requires that competency must be determined by a contradictory hearing. Since the court received and relied upon *ex parte* opinion and hearsay evidence which lacks any indicia of reliability, Michael's right to confrontation and cross-examination was denied.

11. Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399 (1986) suggested two factors to be considered in determining competency for execution: awareness of the punishment and awareness of the reasons why punishment is to be suffered. These factors are necessary but do not provide a sufficient test. The test of competency to be executed should also include a requirement that the record demonstrate stable and predictable competency, not merely fleeting glimpses of comprehension. The trial court did not consider this factor nor does the record in this case reflect any stable and predictable competency.

12. A standard for competency should also consider the inmate's ability to assist counsel when the inmate has post-conviction remedies still available to him. Louisiana law recognizes the ability to assist counsel as a factor in determining competency. Although there was evidence that Michael is not able to assist counsel, the trial court failed to consider this element in evaluating Michael Perry's current condition.

13. Under any standard of competency, Michael Perry is incompetent. He suffers from schizoaffective disorder, a major mental illness that affects his judgment and thinking abilities. Even on medication, he frequently decompensates into psychosis that is so severe that he must be hospitalized. He is a "moving target" who has never had a sustained period of stable competence. His appreciation of the crime of which he is accused, of the fact that he has been convicted and sentenced, and of his punishment is fleeting and unpredictable. The Eighth Amendment prohibits the execution of an inmate with this limited, transitory comprehension.

ARGUMENT

I. THE ORDER TO FORCIBLY INJECT MICHAEL PERRY WITH PSYCHOTROPIC DRUGS, SOLELY IN AN EFFORT TO MAKE HIM SANE ENOUGH TO BE EXECUTED, VIOLATES THE EIGHTH AMENDMENT.

A. THE ORDER WAS NOT ENTERED TO PROVIDE TREATMENT FOR MICHAEL AND IT TAKES NO ACCOUNT OF MICHAEL'S MEDICAL NEEDS.

The testimony and medical records are quoted at length in the Statement of the Case in order to put the trial court's order in context. *Treatment* was not the issue before the court. The issue was whether Michael is currently sane enough to be executed (J.A. 46). The physicians were not appointed to develop a treatment plan for Michael and they did not testify about what they would do to treat him.⁵ The Department of Public Safety and Corrections was not seeking an order, under La. Rev. Stat. Ann. 15:830 and 830.1, to treat or forcibly medicate Michael to protect him or others from harm or to provide for his medical welfare. The prison doctors *had been* treating him and the treatment included psychotropic drugs when these were medically indicated.

Yet what resulted from this hearing was an order that places Michael on medication and keeps him on medication, forcibly if necessary, solely to create competency to be executed. The order makes no pretense that it is for treatment; it gives no consideration to Michael's treatment needs or his interests in avoiding forcible medication.

⁵ See for example, testimony of Dr. Estes - "I don't feel prepared to recommend a course of treatment" (J.A. 94).

The purely legal, non-medical basis for this order is apparent when it is viewed against the background of what the physicians at LSP had been doing for Michael. The doctors at LSP have not been "deliberately indifferent" to Michael's medical needs. What they have been doing since 1985 is *treating* Michael and dealing with his mental problems in a way that *they* believe is medically appropriate. Michael has been receiving long lasting Haldol with supplemental oral or injectable doses. The medication ordered for Michael prior to the emergence of the present competency issue was to minimize decompensation and to provide some symptomatic relief, in accordance with professional medical judgment.

The order does not direct the doctors to simply continue treating Michael as they see fit. The judge has overridden the doctors' judgment, has substituted his own "prescription" and has relegated the doctors to the status of technicians whose purpose is to do whatever is necessary to groom Michael for execution. The order does not permit or even acknowledge the exercise of professional judgment. Although the order says that the drugs are to be "prescribed" by a doctor, the doctors are not given any latitude to design treatment goals or programs. They *must* medicate. They are not authorized to change the order or terminate medication even if professional judgment advises that they do so. An additional sign that this order is punishment, not treatment, comes from the testimony of Dr. Cox and Dr. Vincent. Both of these experts testified that they have ethical reservations about medicating a patient to create competency for execution.

Q: [to Dr. Cox]: . . . [D]o you have an opinion on the medication of a person who suffers from a mental illness in order to make him competent to be executed ultimately?

A: Do I have an opinion as to whether it's appropriate?

Q: [S]eeing that you're in both fields of medicine and law, do you perceive dilemma from either standpoint ethically, morally or otherwise?

A.: I certainly do . . . Ethically, I certainly have problems with giving somebody a medication so they will get better and can be executed. That, to me, presents kind of a catch twenty-two problem. So I think certainly that, yes, there are real problems to me. (R. 569-70).

Q. [to Dr. Vincent]: Do you have any ethical dilemmas or moral dilemmas presented by treating such a person to make him competent to sit in the electric chair?

A. Very, very touchy issue, it's a very difficult issue.

I have no problems in determining if I found him to be competent to proceed in finding him competent to proceed or if I found him not competent to say that he's not competent. (R. 616)

I have some discomfort if I were to treat Mr. Perry to become competent to proceed. . . . [H]elping an individual so that he would become mentally healthy or healthier just so that he would be executed, I have a little bit of uneasiness about that. (R. 617)

In spite of this testimony, the order gives no consideration to medical ethics, to the Hippocratic Oath or to the physicians' guiding principle of "first do no harm".

Because the order is not keyed to Michael's well-being, it contains no limiting principle to take account of the painful, debilitating, and humiliating side effects that

may accompany psychotropic medication. It permits no abatement of the medication even if Michael develops side effects, as he has in the past. There are no time limits; there is no further review. The order is simply to medicate often enough, strongly enough, using whatever combination of drugs is necessary to attempt to achieve competence for execution and to keep doing so indefinitely.

The trial court made no finding as to how these drugs might harm Michael, how Michael might tolerate these drugs or how he might respond. When the State attempted to question the experts on this point, the court emphatically halted that line of questioning:

Q. (By the State to Dr. Estes) . . . Can you treat a man to make him sane so he can be executed?

(By the court) That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. (R. 644).

Medication was never placed at issue until the trial court decided to force medication. No opportunity to litigate the propriety of the proposed medication was given. No chance to be heard or to assert countervailing interests was allowed. At the August 21 hearing when forced medication was first ordered, the court prohibited further briefing (R. 702).

The distinction between treatment and the nature of the order in this case can be summed up in one phrase: "the patient's best interests". Medicine has at its very roots the relief of human suffering and the desire to effect a cure. Even if the trial court's order were to achieve its objective, Michael would nevertheless go to his death with *his underlying mental illness*. All that this order does

is to attempt to eliminate the bar erected against Michael's execution by *Ford* and thereby permit the State to have " . . . [its] judgment [of death] made executory" (J.A. 146). Truly, this reason for medication makes the use of medicine an adjunct to electrocution, not part of the traditional pharmacopeia of the practice of medicine.

The court's order simply declares that "Louisiana's interest in the execution of that jury's verdict override [sic] . . . [the] rights of Mr. Perry." (J.A. 146). It undertakes no inquiry as to whether significant side effects are to be expected or the nature of the harm that could be caused by those side effects. Surely, if Michael is to retain any residue of his status as a human being, the types and extent of the side effects caused by this "judicial prescription" require some sort of inquiry.

Psychotropic drugs affect a patient's thinking processes and ability to communicate. Injection of psychotropic medication represents a "substantial interference with that person's liberty. Cf. *Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757, 772 (1966)." *Washington v. Harper*, 110 S.Ct. 1028 at 1041 (1990). The decision to take such drugs implicates a person's constitutional right to make intimate decisions which fundamentally affect his interests. *Rennie v. Klein*, 653 F.2d 836, 844-45 (3d Cir. 1981); *Davis v. Hubbard*, 506 F. Supp 915, 929-30 (N.D. Ohio 1980).

Psychotropic drugs also have a significant potential for causing side effects. *Harper*, 110 S.Ct. 1028 at 1041 (1990) described these effects as "serious, even fatal". The Physicians' Desk Reference lists the recognized side effects of Haldol as including extrapyramidal syndrome

("EPS"),⁶ tardive dyskinesia,⁷ tardive dystonia, insomnia, restlessness, anxiety, euphoria, agitation, drowsiness, depression, lethargy, headache, confusion, vertigo, grand mal seizures, neuroleptic malignant syndrome,⁸ impaired liver function, anorexia, dry mouth, blurred vision, and cataracts. Dr. Cox testified that these side effects are believed to be the result of neurological or brain damage (R. 574) and, with continued administration of the drugs, a patient has a twenty to twenty-five percent chance of developing such symptoms (R. 574-75).

For Michael the possibility of experiencing these side effects is very real because he has actually suffered such side effects in the past (R. 527, 552-3). As Dr. Jiminez testified:

At one time he was also tried on lithium carbonate but he did not do too well and he developed too many side effects so that was discontinued. (R. 519)

⁶ "Including Parkinson-like symptoms which . . . were usually mild to moderately severe and usually reversible. Other types of neuromuscular reactions . . . have been reported far less frequently, but were often more severe. Severe extrapyramidal reactions have been reported to occur at relatively low doses."

⁷ "A syndrome consisting of potentially irreversible, involuntary, dyskinetic movements may appear in some patients on long-term therapy. . . . The symptoms are persistent and in some patients appear irreversible. The syndrome is characterized by rhythmical involuntary movements of tongue, face, mouth or jaw. . . . There is no known effective treatment for tardive dyskinesia. . . . It is suggested that all antipsychotic agents be discontinued if these symptoms appear."

⁸ "A potentially fatal symptom complex . . . [with] manifestations of hyperpyrexia, muscle rigidity, altered mental status . . . and autonomic instability (irregular pulse or blood pressure, tachycardia, diaphoresis and cardiac dysrhythmia)."

[On Lithium carbonate he] developed some gastrointestinal problems which is usually common in people taking lithium so it was discontinued. (R. 519)

[On Haldol at FFF] he had a very poor tolerance for medication, he developed a lot of side effects. He became very stiff and he would also have some drooling, some of which he exaggerated himself. (J.A. 72)

Illustrative of Michael's poor tolerance for psychotropic medications is the EPS suffered while awaiting trial. The progress notes of November 26, 1983 indicate: "[Michael] does appear slightly stiff - possible EPS. Takes short shuffling steps . . ." (Def.Ex.3; R. 542,543). Serious symptoms appeared on December 15, 1983. He had problems getting out of bed, appeared stiff and "unable to do anything for himself." *Id.* at progress note of December 15, 1983. By January 7, 1984, the diagnosis of EPS was made. *Id.* at progress note of January 7, 1984. On January 9, 1983, Michael's symptoms became more pronounced: "[He] was walking down the hallway, staggering and drooling at the mouth. [He] has a look and walk like he is in a zombie state." *Id.* at progress note of January 9, 1983. Dr. Vargas examined Michael for possible EPS and found shuffling gait, stiffness, increased muscle tone and increased "DTR's". On January 14, Michael was again walking with a shuffling gait. The excessive drooling had resumed. *Id.* at progress note of January 14, 1984.

The next morning Michael fell down the stairway. He was found to have urinated on himself, was almost unable to walk, was still drooling, had a shuffling gait and some movements of his tongue. The doctor noted that although Michael might be exaggerating EPS, "I believe that he does have objective signs of EPS." *Id.* When he

was brought to sick bay the next morning, he had muscular rigidity, was drooling and he had to be held to prevent his falling. His speech was slurred. Dr. Vargas found dehydration, malnourishment, neuromuscular and cardiovascular abnormalities.

Michael was evaluated by Dr. Franklin, a neuropsychiatrist, on January 27, 1984. Examination findings were "underlying psychosis" with Michael's mental status having markedly deteriorated over the previous month. Rigidity and mental confusion were also found. Michael had marked weight loss, difficulties with gait and an urinary tract infection. Gait was described as having a narrow base with an atypical shuffling gait. The diagnosis was "organic encephalopathy of unknown etiology with evidence of extrapyramidal side effects probably secondary to Prolixin." Dr. Franklin began a course of medication to "try to reverse what appears to be extrapyramidal side effects" and felt that Michael should be sent to a general hospital for full evaluation. *Id.* at consultant examination of January 27, 1984. Michael was hospitalized at Charity Hospital in New Orleans from February 3 through February 8, 1984. On his return to FFF, Dr. Jiminez stated that "This patient had been taken off psychotropic medication because he developed side effects." *Id.* at Dr. Jiminez progress note of March 16, 1984.

Side effects are not speculation with Michael Perry. The question then posed is: Can medication, which is known to cause severe side effects in this patient, be given without crossing the Eighth Amendment line? What is being ordered for Michael is not wellness, but exposure to severe, debilitating and humiliating side effects. The specter of dragging an insane inmate to his death was raised in *Ford* and found to be unacceptable to a civilized

society. Can it be any more "civilized" to take a drooling, incontinent, tremulous Michael to the execution chamber?

Furthermore, the medication simply does not achieve the result that the trial court desires. In the years that Michael has been at LSP, he has been medicated extensively. Yet the records, as well as the testimony at the April and September hearings, show that even with massive doses, Michael's competency remains ephemeral.

Under these circumstances, this order is not for treatment. It cannot even be pretended that an order which has no limits, which is not governed by any consideration of the patient's well-being, which allows no exercise of professional judgment and which permits no variance based on the efficacy of the medication is in the remotest sense medical treatment. The order is nothing other than a step toward Michael's execution and thus a part of his punishment (*See, Medley, Petitioner*, 134 U.S. 160, 170-71 (1890)).

The order in effect turns *Ford v. Wainwright*, 477 U.S. 399 (1986) and the Eighth Amendment against Michael. Rather than being protected from execution because he is insane, Michael's insanity has become the justification through which new punishments have become permissible. *Because* Michael is insane, the State is now able to inject him with unlimited dosages of drugs, for an unlimited time, with uncertain outcome.

The use of psychotropic drugs for purposes inimical to treatment has been described as "Orwellian." *See, Large v. Superior Court*, 714 P.2d 399 at 409 (Ariz., 1986). "Orwellian" is indeed an apt adjective to describe what has happened to Michael and what will continue to happen

under this judicial prescription. What the court has ordered here is a prescription which the Eighth Amendment forbids.

B. THE ORDER TO FORCIBLY MEDICATE MICHAEL VIOLATES THE FUNDAMENTAL RESPECT FOR HUMANITY UNDERLYING THE EIGHTH AMENDMENT.

The justification given by the trial court for this order of forcible medication is that:

The citizens of the State of Louisiana through their Legislature have enacted the death penalty for certain crimes. The citizens of Louisiana heard this case through the jury. Mr. Perry is no longer a person surrounded with the veil of the presumption of innocence. He has been found guilty by a jury of his peers and has been sentenced by them accordingly to suffer the ultimate punishment.

And it is felt by this Court that Louisiana's interest in the execution of that jury's verdict override those rights of Mr. Perry. The State is entitled to have that judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurpation of the criminal laws in this area, which were enacted by the State of Louisiana. (J.A. 146).

What the court fails to acknowledge is that, even when a death sentence has been imposed, there are still limits on the state's power to carry out that sentence. A state's power must "be exercised within the limits of civilized standards" *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) citing *Trop v. Dulles*, 356 U.S. 86 at 101 (1958).

In deciding whether those standards have been violated in Michael's case, it is important to note that this order is the product of penological policy-making by a single trial judge. The only official organ of the State which has decided that "Louisiana's interest in the execution of that jury's verdict override [sic] those rights of Mr. Perry" (J.A. 146) is this trial court. The Louisiana Legislature has conspicuously *not* adopted the policy favored by Michael's trial judge: forced medication to produce synthetic competence to be executed. To the contrary, as shown in Part II, the order arbitrarily disregards the whole fabric of pertinent state statutory law which prohibits the use of medication for non-treatment purposes.

Nor has the Louisiana Supreme Court approved this choice. It merely declined to review the order, 4 votes to 3, without opinion. Thus, the ruling that the "State is entitled to have . . . [a death sentence] made executory" and to use forcible medication to achieve that end is not a position that has commended itself to any authoritative lawmaking agency of the State of Louisiana. These points are constitutionally significant for two reasons.

First, Michael is not being drugged and executed pursuant to a consistent, identifiable state policy. Michael is to be medicated solely on the basis of a ruling that is the law of no case but his own. Because this order lacks an authoritative basis in statutory law and lacks the imprimatur of a considered judgment from the Louisiana Supreme Court, Louisiana trial judges in similar cases might or might not subscribe to the same policy judgment. Thus in the administration of Louisiana's death penalty, there is now "a substantial risk that the punishment [of death] will be inflicted in an arbitrary and

capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

Second, the order to medicate Michael to groom him for execution does not come before this Court armored with the kind of credentials that entitle it to deference as an expression of policy from the Legislature or the State's highest court. Rather, it is the type of isolated judicial decision, unsupported by legislative authorization, that the Eighth Amendment was written principally to control.

The "limits of civilized standards" that mark the boundaries of allowable punishment under the Eighth Amendment are gauged by a familiar methodology. The Court has recognized that the meaning of the Eighth Amendment "is not fastened to the obsolete," *Weems v. United States*, 217 U.S. 349, 378 (1910), but "'must [be] drawn[n] . . . from the evolving standards of decency that mark the progress of a maturing society,'" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The analysis of a particular punishment in light of "evolving standards of decency" involves two inquiries. First, the Court examines contemporary standards of decency by focusing upon "objective indicia that reflect the public attitude toward a given sanction," *Gregg v. Georgia*, 428 U.S. at 173, including "the historical development of the punishment at issue, legislative judgments, and the sentencing decisions juries have made." *Enmund v. Florida*, 458 U.S. 782, 788 (1983). Second, "informed by [these] objective factors," *Coker v. Georgia*, 433 U.S. 582, 592 (1977), the Court "bring[s] its own judgment to bear on the matter," *Enmund v. Florida*, 458 U.S. at 788-89, to determine whether the sanction "comports with the basic concept of human dignity at the core of the

Amendment." *Gregg v. Georgia*, 428 U.S. 182. The additional punishment inflicted upon Michael under the trial court's order flouts the evolving standards of decency under both of these measures.

In *Ford v. Wainwright*, 477 U.S. 410 (1986), the Court examined the States' legislative enactments concerning the execution of incompetent prisoners. Finding that the States unanimously rejected execution of the insane, the Court concluded that this consensus established that contemporary standards of decency were offended by such a punishment.

[T]he intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.

Ford, 477 U.S. at 409-10. This same analysis mandates the conclusion that using medication solely for purposes of grooming an inmate for execution is prohibited by the Eighth Amendment.

The Appendix to this brief contains a survey of state statutes providing for involuntary medication of prisoners, the procedures for dealing with insane inmates, and the limitations imposed on forcible medication. As the *Ford* Court observed, all states which have the death penalty prohibit execution when the condemned prisoner is incompetent. Of these States, thirty (30) commit the defendant civilly for *treatment*. One automatically commutes the sentence to life imprisonment.

At least twenty-five (25) States prohibit forcible treatment of incompetent persons absent a *medical emergency* {

or prohibit the use of medication for nonmedical purposes. Thirteen (13) other States prohibit the use of extreme treatments such as lobotomies.^{9 10}

No state has passed legislation authorizing the use of medication to establish competency for execution nor is counsel aware of any case in which medication has been authorized for this purpose. Except for the order in Michael's case, Louisiana has never authorized medication to achieve competency for execution. Ford certainly brought to the fore the question of executing the insane. Yet in the wake of Ford neither Louisiana nor any other state has found it appropriate to use drugs to circumvent the prohibition against executing the insane or to carve out condemned incompetent prisoners from the general prohibition against involuntary medication for nonmedical purposes. This consensus shows that "contemporary standards of human decency" prohibit what the trial court has ordered for Michael.

II. THE MEDICATION ORDER ALSO VIOLATES MICHAEL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

How did the trial court conclude that Louisiana approves the use of drugs to create competency to be executed? There is no Louisiana statute which condones this practice. There is no decision from the Louisiana Supreme

⁹ Psychotropic drugs have been classified as intrusive and extreme as lobotomies and electroshock surgery (*Guardianship of Roe*, 421 N.E.2d 40 at 53 (Mass. 1981)).

¹⁰ The issue of forced medication has been poignantly and eloquently articulated in a note entitled *Medical Ethics and Competency to be Executed*, 96 Yale L.J. 167 (1986), and was also observed in a casenote, at 47 La. L. Rev. 1351, 1361 (1987).

Court authorizing it. There is not even an administrative regulation which contemplates it.

To the contrary, Louisiana's statutes on treatment of insane inmates, on forcible medication, and on the use of medication clearly forbid what the trial court has ordered. The Code of Criminal Procedure articles on incompetency provide:

If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues.

...

(3) If . . . the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. La. Code Crim. Proc. Ann. art. 648 (1988)

Although these articles are phrased in terms of pre-trial incompetency, they have been applied to post-conviction proceedings (*see State v. Henson*, 351 So.2d 1169 (La. 1977)). They were specifically cited by the Louisiana Supreme Court in Michael's direct appeal as the framework through which to determine his competency to be executed (*State v. Perry*, 502 So.2d 543, 563-4 (La. 1987); *LA* 43-44).

Louisiana's law on forcible medication of inmates is La. Rev. Stat. Ann. 15:830.1. That statute permits forcible medication for no longer than fifteen days and then *only* when (1) the inmate is mentally ill or retarded and (2) a

physician certifies that medication is necessary to prevent harm to the inmate or others. *Id.* 15:830.1 (A). Medication beyond fifteen days is permitted *only* if (1) a petition has been filed with the court; (2) the petition sets forth reasons for the treatment; (3) there is a hearing at which the inmate has a right to counsel; and (4) the court determines that the inmate is incompetent. *Id.* If these conditions are met, the inmate is to be given "appropriate treatment" at a treatment facility. *Id.* 15:830.1 (B) in accordance with all procedures required by law for civil commitments. *Id.* 15:830.1 (C).

Louisiana law on the use of medication is La. Rev. Stat. Ann. 28:171. Section P of that statute states:

No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. . . . *Medication shall not be used for non-medical reasons such as punishment or for convenience of the staff.* (Emphasis added).

The theme throughout these statutes is "treatment". Treatment is the exclusive justification for forced medication. Nowhere in Louisiana law is there authorization for forcible medication for any reason other than treatment.

All of these statutes are written in mandatory language - petition *shall* be filed", "Court *shall* determine whether the inmate is competent", and if the inmate is not competent, the court "*shall* order that appropriate treatment be provided." In *Harper*, ___ U.S. ___, 110 S.Ct. 1028 at 1036, this Court recognized that an order for forced medication, written in mandatory language, creates a liberty interest protected by the Due Process Clause:

In *Hewitt v. Helms*, 459 U.S. 460 (1983), we held that Pennsylvania had created a protected liberty interest on the part of prison inmates to avoid

administrative segregation by enacting regulations that "used language of an unmistakably mandatory character, requiring that certain procedures "shall", "will", or "must" be employed Policy 600.30 is similarly mandatory in character. By permitting a psychiatrist to treat an inmate with psychotropic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the Policy creates a justifiable expectation that drugs will not be administered unless those conditions occur.

When a regulation or statute creates such expectations, the Due Process Clause "insure[s] that the state-created right is not arbitrarily abrogated." *Meachum v. Fano*, 427 U.S. 215, 227 (1976) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)). This Court need not decide whether the Fourteenth Amendment requires exactly the same statutory scheme that Louisiana has adopted. A state, by its enactments or decisional law, may create an expectation which is broader than the substantive protection provided by the United States Constitution. *Ford*, 477 U.S. at 421 n.3, (Powell, J., concurring); *Mills v. Rogers*, 457 U.S. 291, at 300 (1982).

Louisiana's statutory law and jurisprudence on medication has created expectations cognizable under the Due Process Clause. Like the policy in *Harper*, these statutes "undoubtedly confer[] upon respondent a right to be free from the arbitrary administration of antipsychotic medication." *Harper*, 110 S.Ct. at 1036. The trial court's order denies Michael the expectation that he will be medicated only in accordance with Louisiana statutory law and, thus, is a violation of Due Process.

III. THE TRIAL COURT'S ORDER FAILS TO MEET MINIMAL DUE PROCESS REQUIREMENTS.

Harper, ___ U.S. ___, 110 S.Ct. 1036-37 recognizes that an order of forced medication must be evaluated not only in light of the state's statutory scheme but also in light of the Due Process Clause:

We have no doubt that, in addition to the liberty interest created by the State's policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. . . .

Harper, 110 S.Ct. at 1036-37.

Harper permitted this interest to be curtailed only upon a finding "that a mental disorder exists that is likely to cause harm if not treated" and "the treatment is in the inmate's medical interest" and "the drugs may be administered for no purpose other than treatment and only under the direction of a licensed psychiatrist." *Harper*, 110 S.Ct. at 1039-40. In ruling in Michael's case that the state's interest in carrying out its sentence overrides any interests that Michael has, the court failed to undertake this balancing of interests required by the Fourteenth Amendment. Obviously, a state has an interest in seeing its criminal penalties carried out. But the court's conclusion that the death penalty justifies anything and everything that happens to Michael, with no limits whatsoever, goes too far.

Louisiana has said that it will not execute Michael when he is insane (*State v. Perry*, 502 So.2d at 563-64, J.A. 43). Using forced medication solely as a means to groom Michael for execution, without in any way limiting that order or considering Michael's interests and medical needs, violates the limits set in *Harper*.

IV. THE TRIAL COURT'S FINDING OF MICHAEL'S COMPETENCY WAS MADE THROUGH PROCEDURES THAT FAILED TO AFFORD THE SAFEGUARDS REQUIRED BY THE EIGHTH AMENDMENT AND DUE PROCESS.

At the April 20, 1988 hearing, each of the experts found Michael incompetent (J.A. 63, 69, 70, 89). At that hearing the defense and the state both rested (J.A. 97-98). The court asked for briefs and set the ruling for May 26, 1988 (R. 692).

After the April 20, 1988 hearing the trial court began *ex parte* communication with the State. The information provided to the trial court was not made available to counsel for Michael. Nor were they even made aware of the existence of these communications. Counsel first became aware of these materials when the State cited a "weekly report" in its brief to the trial court *after* the April, 1988 hearing (R. 122).

Defense counsel filed a written motion (R. 194) objecting to the Court receiving or relying on any such communications, citing Michael's right of cross-examination, confrontation, basic due process and Sixth Amendment concerns. Counsel also asked for a hearing on whether this communication should be considered.

No hearing was granted and on August 26, 1988 the Court denied the written motion (J.A. 110). The court stated that it would rely upon and was considering these materials (J.A. 111). The result of the court's reliance on the uncross-examined, unsworn hearsay and opinion was a "new" hearing set by the Court on September 30, 1988. No express ruling on Michael's competency has been made from the "old" hearing.

This *ex parte* communication consists of communications with Department of Corrections' counsel and commentary on Michael's condition by Department of

Corrections personnel (J.A. 99-106). These individuals were never called to testify, were never subjected to cross-examination or to the basic rule of competency – the oath. Their reports offer opinions even though the authors were never qualified as experts; the factual foundation justifying these opinions is not given.¹¹

These materials lack any indicia of reliability. For example, one of the documents is a note from a social worker who writes that she "saw [Michael] while . . . on the tier to see another inmate. He appears to be in fair remission". (J.A. 106). "Fair" as compared to what? What had she seen the day before, or week before – a decompensated, insane Michael? On what facts was this opinion based – did she interview him, do diagnostic testing, or did the author just catch a glimpse of Michael as she walked down the hall? We will never know.

A second report (J.A. 101-02) is a response by a social worker to three questions, namely Michael's condition on medication, his condition immediately after being removed from medication, and his condition after being off medication for an extended period. Unlike medical records or charts which are maintained by medical professionals in the ordinary course of diagnosis or treating a patient, this document was specially prepared for submission to the court (J.A. 101). The answers are *not* a factual synopsis from the chart; they are opinions and impressions.

¹¹ The materials included in the record may not be all of the *ex parte* communications given to the court. One item (J.A. 99) refers to "prior conversation" with the court and states that there will be more weekly reports submitted in the future.

Another excerpt consists of *one day's* nursing notes from Michael's hospital record at LSP (J.A. 104-05). Michael is constantly being hospitalized. Why pick this one day? The answer is obvious – this was an attempt to convey the impression that Michael is rational. However, the testimony from the April and September 1988 hearings shows that Michael's contact with reality varies on a daily (or less) basis. Selecting one day as a measure of Michael's condition is not a fair attempt to keep the Judge updated on Michael's condition – it is a blatant attempt to pick and choose "evidence" most beneficial to the State, outside of the ability of defense counsel to challenge the evidence and demonstrate that this is not representative of Michael's condition.

The purpose of cross-examination is to explore questions so the trier of fact can determine what weight, if any, to give to the witness' testimony. Michael was denied this opportunity because of the *ex parte* nature of these communications. As stated in *Ford*, 477 U.S. at 416:

[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of the truth. . . . Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the basis for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent. . . . The failure of the

Florida procedure to afford the prisoner's representative any opportunity to clarify or challenge the state experts' opinions or methods creates a significant possibility that the ultimate decision made in reliance on those experts will be distorted.

The procedural defect in Michael's case is as egregious as the defect which led this Court to find Florida's procedure inadequate. In *Ford*, defense counsel was not given an opportunity to present evidence and cross-examine the experts. In Michael's case, there was a hearing at which the State and defense questioned the members of the sanity commission. The problem is that the record was "supplemented" with *ex parte* reports and those reports obviously influenced the court's decision. The court so stated. (R. 700).

This Court has said on at least three occasions that determinations of competence must comply with minimal due process, cross-examination and confrontation. In addition to *Ford*, the Court in *Vitek v. Jones*, 445 U.S. 480 (1980) held that the transfer of an inmate for psychiatric treatment without adequate hearing and confrontation was unconstitutional. In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court reversed when the trial judge relied on a psychiatrist's report, without a hearing, in determining that a defendant should be transferred to a mental hospital. The Court found that a procedure which considered hearsay evidence and denied cross-examination and confrontation violated due process.

In addition to constitutional requirements, Louisiana has statutes which guarantee an adversarial proceeding when competence is at issue. Notice, hearing, confrontation and cross-examination are expressly a part of the Code of Criminal Procedure Articles on sanity commissions (La. Code Crim. Proc. Ann. art. 647). A hearing with

notice and representation by counsel is required by the statute on commitment of insane inmates (La. Rev. Stat. Ann. 15:830) and the statute on medication of inmates (La. Rev. Stat. Ann. 15:830.1). The statutes are couched in "language of an unmistakably mandatory character".

What is at issue is that the integrity of the factfinding process broke down. The procedure used by the trial court is contrary to Louisiana law and fails to provide the rudiments of Due Process. These deficiencies warrant the reversal of the trial court's decision.

V. THE TRIAL COURT'S FINDING OF MICHAEL'S COMPETENCY DOES NOT MEET EIGHTH AMENDMENT STANDARDS.

A. THE FINDING OF COMPETENCY DOES NOT MEET THE STANDARDS OF *FORD* BECAUSE IT DOES NOT ASSURE THAT MICHAEL WILL ACTUALLY BE COMPETENT AT THE TIME OF EXECUTION.

While concluding in *Ford* that executions of the insane are unconstitutional, this Court has not stated how competency to be executed should be defined. Justice Powell addressed this question in an often quoted concurrence:

If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Ford, 477 U.S. at 422. see also *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989).

Michael Perry's case demonstrates that, while the factors listed by Justice Powell are *necessary* considerations, they do not provide a *sufficient* basis for defining competence under the Eighth Amendment. Therefore, when the trial court adopted Justice Powell's concurrence as the test for Michael's competency (J.A. 141, 145), it omitted key factors which must be considered if Michael's sentence is to be constitutionally carried out.

The first factor which was omitted is reliability. This Court has stated that the Eighth Amendment's prohibition against cruel and unusual punishment creates a special need for certainty and reliability when the death penalty is to be imposed (*Johnson v. Mississippi*, 486 U.S. 578 at 584 (1988) citing *Gardner v. Florida*, 430 U.S. 349, at 363-64 (1977), *Woodson v. North Carolina*, 428 U.S. 280, at 305 (1976)). The definition of competency should thus include a requirement that the inmate's competency be stable and predictable. Otherwise, there can be no certainty that, *at the time of his execution*, the inmate is in fact competent.

Michael lacks this predictability, reliability, and stability. Dr. Cox described him as a "moving target" (J.A. 81); there is no way to predict whether any particular day will be good or bad (J.A. 79). For example, Dr. Jiminez found Michael incompetent on February 4, 1988 (J.A. 70). When Dr. Cox saw Michael on March 3, 1988, he felt that Michael was "functioning as well as [Dr. Cox] had seen him function" (J.A. 79) and that he was aware that he was to be executed. When Dr. Vincent saw him two days later, he was "floridly psychotic" and not competent to be executed (J.A. 90). The LSP records show numerous occasions when Michael was released from the hospital as "stable" or "improved" only to be readmitted within a matter of days as decompensated and psychotic.

With this instability and unpredictability, how is Michael's execution to be carried out? Can the state wait until a "good day" and execute Michael? Can Michael be executed if his "good days" outnumber his "bad days" by some amount? What amount? And what happens if the date set in the death warrant is a "bad day"?

When Dr. Cox says that Michael was doing better in March 1988, the inevitable question is "better than what"? For Michael, "better" may mean that he no longer thinks he is a CIA agent or that he has stopped feeding soap to the toilet. His competency is only "a relative thing" (J.A. 78). *Even with his medication and even on his best days*, Michael has never been completely coherent, rational and well-integrated (J.A. 83-84). When Dr. Cox saw Michael in September, 1988, he concluded that he was getting *worse* even on medication (J.A. 115-16). Dr. Jiminez described him as "ambivalent" and inconsistent in his comprehension. It is this symptom which caused her concern about his competence and this symptom cannot be cured by medication (J.A. 75-76).

A standard which defines competency as simply "doing better" is arbitrary. A standard which permits competency to be based on fleeting glimpses of insight or the ability to "mouth the right words" does not ensure the reliability that the Eighth Amendment requires. When competency lasts for only a day or two and there is no way to predict when the inmate will or will not be competent, the death penalty becomes capricious and arbitrary. It is literally a question of the executioner catching the inmate on a "good day" or else subjecting him to an execution that is unconstitutional.

A standard which permits competency to be based on fleeting glimpses of insight also encourages repetitious, last minute pleas for stays of execution. Under such a

standard a record presented to a District Court, even if it adequately reflects the prisoner's condition at a point in time, becomes inaccurate by the time the same case reaches the Court of Appeal and even more inaccurate by the time it reaches this Court. The choice then becomes either executing someone who cannot understand his punishment or inviting additional evidentiary hearings.

While Michael's condition is obviously peculiar to him, his facts show why Justice Powell's standard should be expanded. Adopting a standard which requires demonstrated stable, predictable competence allows some assurance that the record being reviewed truly reflects the inmate's condition. Such a standard would provide the degree of reliability that *Furman v. Georgia*, 408 U.S. 238 (1972) and *Woodson*, 428 U.S. 280 (1976) require.

B. THE PROPER EIGHTH AND FOURTEENTH AMENDMENT STANDARD REQUIRES CONSIDERATION OF A CONDEMNED INMATE'S CAPACITY TO CONSULT AND COOPERATE WITH COUNSEL IN PURSUING SUCH POST-CONVICTION PROCEEDINGS AS ARE NOT YET EXHAUSTED.

The second factor omitted by the trial court was a consideration of Michael's ability to assist counsel in his remaining post-conviction proceedings. The ability to assist counsel is part of Louisiana's definition of competency in Code Crim. Proc. art. 641:

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Per La. Code Crim. Proc. Ann. art. 642, a defendant's mental capacity to proceed may be raised at any time. Once a defendant's mental capacity to proceed is raised,

all proceedings cease until the defendant is found to have the mental capacity to go forward.

Since *State v. Allen*, 15 So.2d 870 (La. 1943), the Louisiana Supreme Court has applied this statutory scheme in the context of post-trial competence to be executed. *Allen* extends the competency-to-stand trial articles to post-conviction situations. In *Allen*, the Louisiana Supreme Court found that before a defendant will be executed, competency must be demonstrated, "[F]or the same reason that a person is entitled to a hearing before a conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of procedure govern." *Allen* at 871; A defendant, then, must be able to understand the nature of the proceedings, or be able to assist in his defense before Louisiana will execute him since the same rules govern.

In *State v. Perry*, 502 So.2d 543 (La. 1986), the Louisiana Supreme Court approved the application of *Allen* to post-conviction determinations of competency to be executed:

Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the Court or the prosecutor. La.C.Cr.P. art. 642.

If the defendant seeks a sanity commission prior to execution, he bears the burden of providing the trial court with a reasonable ground to believe he is presently insane. *State v. Allen, supra*; La.C.Cr.P. art. 642; *State v. Lowenfield, supra*. Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution.

Perry, 502 So.2d at 564.

Perry's "present capacity to undergo execution" incorporates the standards for competency set forth in

La.Code Crim. Proc. Ann. art. 641 and elaborated upon in *State v. Bennett*, 345 So.2d 1129, 1138 (La. 1977). Since *Allen* requires a hearing on the question of competency to be executed "for the same reason" that a person is entitled to a hearing before conviction, the same factors which *Bennett* requires a Court to consider in determining competency before trial, are applicable to the post-conviction context.¹²

¹² To divorce competency to be executed from competency to assist counsel creates more problems. If a defendant is entitled to seek post-conviction relief, then he must be able to sufficiently review the case with his counsel so that counsel can prepare a complete and sufficient post-conviction petition. In fact, in order to ensure fairness in post-conviction capital cases, many states, Louisiana included, have sought the assistance of large civil law firms to provide representation in post-conviction death cases. Judge Rubin of the United States Court of Appeals for the Fifth Circuit stated the matter succinctly: "Why are the courts involved in this project? Because we believe that no person should be executed until he has had a fair opportunity with the benefit of competent counsel to have the constitutionality of his conviction and sentence reviewed." Rubin, *You Don't Have to be a Bleeding Heart: A Call For Tough Minded Lawyers Who Believe in Due Process*, 35 La. B.J. 240, 241 (1987). See also, *Criminal Law and Procedure*, 35 Loy. L. Rev. 833, 856-57 (1989). That is what happened in Michael's case. By written order of the Louisiana Supreme Court, counsel was appointed to represent him in post-conviction proceedings. The import is clear: the judiciary is seeking competent counsel to represent death row inmates in post-conviction proceedings. Notwithstanding the fact that death row inmates might understand the punishment they are to suffer and why they are to suffer it, if they are unable to assist counsel in the preparation and presentation of petitions for post-conviction relief, then a defendant's right to seek post-conviction relief in both the state and federal court systems is meaningless and violates due process since counsel was appointed by court order to assist the inmate.

Under *Bennett* the condemned person must understand the nature of the proceedings against him, i.e., understand *he* has been sentenced to death for *his* having committed the crime; and he must participate with informed appreciation in the execution of that sentence, i.e., understand the nature and finality of the death penalty. Lastly, he must be able to assist in his defense, i.e., he must be able to provide meaningful assistance in the defense of his life by understanding the proceedings.

The *Bennett* criteria are similar to Standard 7-5.6(b) of the American Bar Association's Criminal Justice Mental Health Standards on Competence and Capital Punishment which states:

A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. *The convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the Court.* (emphasis added).

The ABA Task Force was concerned that "the integrity of the criminal justice system is eroded by the execution of a defendant who is incapable of understanding the penalty that is about to be imposed or who is unable to communicate exculpatory or mitigating information that might effect the decision regarding capital punishment." (Commentary on Rule, 7-5.6). The Task Force found "[t]he possibility that a defendant could be executed because of inability to communicate information that could be relevant to the decision whether to carry out the death sentence is equally unacceptable as executing someone who

could not understand the penalty." (Commentary on Rule, 7-5.6(b), footnote 7). Recognizing that Justice Powell's concurrence is limited, the Task Force stated that the ABA standard addresses "both ability to understand the proceedings and ability to assist counsel."

The trial court in Michael's case acknowledged *Allen* and the Code of Criminal Procedure articles (J.A. 130-31) but then ignored the very "set of statutes [it had] to work with." The trial court failed to apply that statutory scheme and its jurisprudence to the post-conviction setting as required by *Allen* and failed to inquire whether Michael has the ability to understand these proceedings.

The testimony shows that Michael does not understand fully the nature of these proceedings and cannot assist counsel in present or future representation regarding the presentation of his case, including these very proceedings. At the September hearing, Dr. Cox made that fact abundantly clear¹³ as did Dr. Vincent in the April hearing.¹⁴

¹³ "As far as the issue of being able to participate meaningfully in legal proceedings, testify, help an attorney, make rational decisions, basically the *Bennett* criteria as outlined in the Louisiana Supreme Court decision, I did not feel he was competent under those standards for legal participation." (J.A. 116)

¹⁴ "As of March 5th . . . he was also very tangential, he had some difficulty paying attention and as a result I would see him having some difficulty assisting in his defense today, for instance. . . . To be able to sit in the courtroom, hear what the witness is talking about here, hear what the members of the court are talking about, critically evaluate these and give some information to his attorney as to whether that's accurate or inaccurate or whether he has some additional information that he would provide." (R. 629)

By subjecting Michael Perry's competence solely to Justice Powell's *Ford* analysis, the trial court derogated rights Michael Perry has pursuant to Louisiana statutory law. Because Louisiana law recognizes, as *Ford* said, "a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum"¹⁵ the trial court's failure to recognize and apply those standards violates Michael Perry's Fourteenth Amendment right to Due Process. As pointed out by Justices O'Connor and White in their concurring opinion in *Ford*, when a state clearly gives certain rights to a defendant, the arbitrary failure to recognize those rights deprives the individual of Due Process. See also *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

Accordingly, Michael's case clearly demonstrates an expansive view is needed and that standard of competency to be executed should encompass the ability of the condemned inmate to assist his counsel. Adding this requirement is essential because even if an inmate fleetingly understands the reason he is to be executed and that he will die, that fact does not mean that he is sane, competent, in touch with reality or able to assist counsel.

C. UNDER ANY STANDARD, MICHAEL PERRY IS INCOMPETENT TO BE EXECUTED.

Like Alvin Ford (*Ford*, 477 U.S. at 404), Michael is confused about who killed his parents, whether or not

¹⁵ The Louisiana Constitution provides that [n]o law shall subject any person to . . . cruel, excessive, or unusual punishment." La. Const. Art. I Section 20. See *State v. Sepulvado*, 367 So.2d 762, 764-766 (La. 1979). See also Note, 47 La. L. Rev. 1351, 1359, 1364 and n. 62 (1987), supporting the position that Louisiana provides greater substantive and procedural safeguards than *Ford*.

they are even dead and why he is in prison. From day to day, Michael's grasp of reality is mercurial. Dr. Cox testified that when Michael becomes psychotic he is not competent to be executed. (R. 551). Michael has the delusion that he is God and "that he could not be killed by electrocution, that it would take several hours for the staff to figure this out and it would be a struggle but that he would prevail and he would not be executed." (R. 556A).

Also like Alvin Ford, Michael does not believe that he is to die for the murders for which he has been convicted. When the trial court asked Michael if he knew he had been brought to trial for killing five members of his family, Michael answered "I didn't do it" (R. 671). When asked if he understood that the jury had found him guilty, Michael responded "I didn't know that. They told me innocent." (R. 672).

Under Justice Powell's standard, Michael does not comprehend the nature of his crime or his punishment in any meaningful way. If the additional requirement of reliability is added to Justice Powell's standard, Michael certainly is incompetent. Michael's illness makes him a "moving target" whose competency changes frequently.

What is presented in the Statement of the Case is a picture of incurable insanity. The abhorrence that this court expressed at the execution of the insane in *Ford* should be felt no less here. The retributive value of Michael's death is undermined by his fleeting understanding of the murders, his role in them, and the penalty that has been imposed for them. Michael Owen Perry is insane and may not be executed.

CONCLUSION AND RELIEF REQUESTED

The trial court committed numerous errors of constitutional proportions. The court ignored Louisiana's statutory scheme for treating mentally ill prisoners and substituted in its place an order which finds no support in Louisiana policy or law. Considering hearsay evidence outside the record violates Michael's right to confrontation and cross-examination. Proceeding with these hearings, in the face of testimony that Michael is presently incompetent to proceed, violated La. Code Crim. Proc. Ann. art. 642, and his due process rights under the Fourteenth Amendment. Without reaching the incredibly difficult constitutional issues raised on the merits of this writ, this Court can reverse for these defects alone.

Even if these proceedings were procedurally sound, the trial court's ruling cannot stand constitutionally. Louisiana has joined the majority of states in treating - not executing - its insane inmates. The Eighth Amendment prohibits executions of the insane based on demonstrated standards of "human decency". Those same standards, as demonstrated in Louisiana and the rest of the states, condemn what the trial court has done here. Using medication as an experiment to try to achieve synthetic sanity to be executed is constitutionally offensive and simply wrong by any measure of humanity and respect for the dignity of "even" a death row inmate.

Ironically, Michael's condition and history make this case an easy one in one sense - there is no question that Michael is insane under any meaningful standard of competency. This Court need do no more than restate what has already been said in *State v. Perry* - Louisiana does not execute the insane. Then apply existing law which says that all proceedings must stop until competence is

regained - not by an experiment - but by treatment which is guided by the exercise of professional judgment and sound medical ethics. If competence can be regained by this method, then the State may be able to exact its retribution on Michael. If competence is not regained by *treatment* and Michael is not executed, that is the price that the Eighth Amendment demands to maintain our "standards of human decency".

Petitioner, Michael Owen Perry, therefore prays that the order of the trial court be reversed.

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App. 1

CHART 1

Survey of State Statutes on Disposition of
Inmates Found Incompetent to be Executed.

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
ALABAMA	SUSPEND EXECUTION	ALA. CODE SEC. 15-16-23 (SUPP. 1988)	Y. STATE HOSP.
ALASKA	STAY PROCEEDINGS	SEC. 12.47.110(1984)	CUSTODY COMMISSIONER HEALTH & SOC. SERV.
ARIZONA	SUSPEND EXECUTION	A.R.S. SEC. 13-4024 (1978)	Y. STATE HOSP.
ARKANSAS	SUSPEND PROCEEDING	SEC. 5-2-31b (1987)	Y. STATE HOSP.
CALIFORNIA	SUSPEND EXECUTION	WEST'S ANN.CAL.PENAL CODE SEC. 370041 sec. (1982)	Y. MED. FACIL. OF DEPT. OF CORR.
COLORADO	SUSPEND PROCEEDINGS	COLO.REV.STAT. SEC. 16-8-112(2) (1986)	Y

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
CONNECTICUT	STAY EXECUTION	C.G.S.A. SEC. 54-101(1988)	Y, STATE HOSP.
DELAWARE		DEL.CODE ANN., TIT.11, SEC.406(1987)	Y, TRANSFERED TO STATE HOSP.
D.C.			
FLORIDA	STAY EXECUTION	WEST'S F.S.A. SEC. 922.07(1985)	Y, DEPT.CORR.MENT. HEALTH TREAT FACIL.
GEORGIA	NO EXECUTION IF MENTALLY INCOMP.	O.C.G.A. SEC. 17-10-61 & 62(SUPP.1988)	Y, DEPT. OF HUMAN RESOURCES
HAWAII			
IDAHO	REPEALED SEC. 19-2709-2712: INQUIRY INTO DEF'S SANITY- PROC (1987)		
ILLINOIS	REMANDED TO CUSTODY	ILL.REV.STAT.1983, ch. 38, PAR. 1005-2-3(1982)	Y, DEPT.OF CORRECT.
INDIANA	PROVIDE CARE AND TREATMENT	WEST'S A.I.C. 11-10-4-2(1984)	Y, INVOL.TRANSFER TO MENT.HEALTH FACIL.
IOWA			
KANSAS	SUSPEND EXECUTION	K.S.A. SEC. 22-4006(3)(1983)	
KENTUCKY	STAY EXECUTION	KY.REV.STAT.ANN. SEC. 431.240(BALDWIN 1985)	Y, STATE FORENSIC PSYCH.FAC.
LOUISIANA	SUSPEND PROCEEDINGS	STATE V. ALLEN, 15 So.2D 870 (La. 1943)CIVIL CODE OF CRIM. P. Art. 641 ET SEQ.	
MAINE			
MARYLAND	EXECUT. PROHIBITED IF INCOMP.	MD.ANN.CODE, ART.27, SEC. 75A(2)(b) (1985 SUPP.)	N, REMAND FOR LIFE SENTENCE
MASSACHUSETTS	STAY EXECUTION	ALM GL c279 SEC. 62 (1986)	Y, STATE HOSP.
MICHIGAN			
MINNESOTA			
MISSISSIPPI	STAY EXECUTION	MISS.CODE ANN. SEC. 99-19-57(2) (SUPP.1988)	Y, FORENSIC UNIT STATE HOSP.

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
MISSOURI	STAY EXECUTION	V.A.M.S. SEC. 552.060(1978)	Y, HELD IN PENAL INST. SUBJ.TRANSF.MENT.HOSP.
MONTANA	SUSPEND EXECUTION	MONT.CODE ANN.SEC. 46-19-202, AND SEC. 46-14-221(1987)	Y, STATE HOSP.
NEBRASKA	SUSPEND EXECUTION	R.R.S., 1943 SEC. 29-2537(SUPP.1988)	
NEVADA	SUSPEND EXECUTION	N.R.S. SEC. 176.455(1977)	Y, DIRECT DEPT.PRISONS TO CONFIN IN SAFE PLACE
NEW HAMPSHIRE			
NEW JERSEY	DOES NOT STATE	N.J.S.A. SEC. 30:4-82 x (WEST 1981)(SUPP.1988 REPEALED)	PLAN FOR CARE IN PROGRESS
NEW MEXICO	SUSPEND EXECUTION	N.M.STAT.ANN. SEC. 31-14-7(1984)	Y, STATE HOSP.
NEW YORK	SUSPEND EXECUTION	N.Y. CORREC.LAW SEC.656 x (McKINNEY SUPP.1986)	Y, STATE HOSP.

App. 4

NORTH CAROLINA	NO PERSON MAY BE TRIED, CONVICTED, OR PUNISHED IF MENTALLY ILL	N.C.GEN.STAT.SEC. 15A-1001(1983)	Y, INVOL.CIV.COMMITMT.
NORTH DAKOTA			
OHIO	SUSPEND EXECUTION	OHIO REV.CODE ANN. SEC. 2949.29	
OKLAHOMA	SUSPEND EXECUTION	X 22 OKL.ST.ANN.SEC. 1008(1986)	Y, STATE HOSP.
OREGON			
PENNSYLVANIA			
RHODE ISLAND	CONFINEMENT	R.I.GEN.LAWS SEC. 40.1-5.3-7	Y, STATE MENT.HOSP.
SOUTH CAROLINA	CONFINEMENT	S.C.CODE SEC. 44-23-220(1985)	Y, MENT.HEALTH FAC.
SOUTH DAKOTA	SUSPEND EXECUTION	SDCL TITLE 23A-27A-24(1979)	Y, HUMAN SERVICES CENTER
TENNESSEE			
TEXAS	HOSPITALIZED	TEX.CODE CRIM. PROC.CODE ANN., ART. 46.01(1979)	Y, CIV.COMMITMENT MAX.SECURITY

App. 5

STATE	DISPOSITION OF INMATE FOUND INCOMPETENT FOR EXECUTION	CITATION	COMMITMENT
UTAH	STAY EXECUTION	UTAH CODE ANN.SEC. 77-19-13(SUPP.1988)	Y, COMMITMENT
VERMONT			
VIRGINIA	HOSPITALIZED	VA.CODE SEC. 19.2-111(1983)	Y, DESIGNATED FACILITY
WASHINGTON			
WEST VIRGINIA			
WISCONSIN			
WYOMING	SUSPEND EXECUTION	WYO.STAT.SEC. 7-13-901-903 (SUPP.1985)	Y, FAC.TO STUDY MENT.CONDITION/30 DAYS

CHART 2

Survey of State Statutes on Forcible Medication
and Experimental Medication

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
ALABAMA	N				
ALASKA	Y	RT. TO BE FREE FROM UNNEC. EXCESSIVE MED.	SEC. 47.30.825 (1984)	PROHIBITED	SEC. 47.30.830 (1984)
ARIZONA	Y	CONSENT NEEDED	A.R.S. SEC. 36-513 (1978)	PROHIBITED	A.R.S. SEC. 36-561 (1978)
ARKANSAS	N				
CALIFORNIA	Y	RT.TO REFUSE CONVULSIVE TREAT.	WEST'S ANN. CA. WELF. & INST.CODE SEC. 5325(1982)	CONSENT FOR CONVUL. TREAT.	WEST'S ANN. CA. WELF. & INST.CODE SEC. 5325 (1982)

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
CONNECTICUT	Y	NO CONSENT NEEDED U/L SURGERY	C.G.S.A. SEC. 17-206d(1988)	CAN'T BE USED AS SUBSTITUTE FOR HABILITATION	C.G.S.A. SEC. 17-206-e (1988)
DELAWARE	Y	CONSENT FOR SURG., SHOCK, MAJ. MED.	DEL. CODE ANN., TIT. 16, SEC. 5161(SUPP.1988)	NEED WRITTEN CONSENT FOR MENTAL HOSP. PATIENT	DEL. CODE ANN., TIT. 16, SEC. 5161 (SUPP.1988)
D.C.	Y	RT. TO BE FREE FROM UNNEC., EXCESSIVE MED.	SEC. 6-1965 (1981)	EXPRESS & INFORMED CONSENT NEEDED	SEC. 6-1969 (1981)
FLORIDA	Y	RT. TO BE FREE FROM UNNEC., EXCESSIVE MED.	WEST'S F.S.A. SEC. 393.13(F)(1985)	EXPRESS & INFORMED CONSENT NEEDED	WEST'S F.S.A. SEC. 393.13(6) (1985)
GEORGIA	N				
HAWAII	Y	Y, EXCEPT EMERGENCY	TIT. 19, CH. 334E-1(1985)	RT. TO REFUSE	TIT. 19, CH. 334E-2(10) (1985)

IDAHO	Y	Y, EXCEPT EMERGENCY	SEC. 66-412 (SUPP.1988)		
ILLINOIS	Y	Y, U/L NECESSARY	ILL. REV. STAT. 1983, ch. 91 1/2, par. 2-107(SUPP.1988)		
INDIANA	Y	MUST PETITION CT.	WEST'S A.I.C. 16-14-1.6-7(1984)	PROCEDURES SET OUT IN;	WEST'S A.I.C. 11-10-4-6 (1984)
IOWA	Y	SHOCK/ CHEMO. THERAPY	I.C.A. SEC. 229.23(1985)		
KANSAS	Y	CONSENT FOR PSYCHOSUR., ELECTRO- SHOCK, HAZ. TREAT.	K.S.A. SEC. 59-2929(1983)	CONSENT FOR EXPERM. MED.	K.S.A. SEC. 59-2929 (1983)
KENTUCKY	Y	Y, SUBJECT TO REVIEW	KY. REV. STAT. ANN. SEC. 202A.191 (BALDWIN 1985)		

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
LOUISIANA		CT, CONSENT FOR SURGERY OR ELECTRO- SHOCK	LSA-R.S. 28:171	NO	LSA-R.S. 28:171P
MAINE	N	REPEALED TITLE 34 M.R.S.A.	SEC. 2251-2255: HOSPITALIZA- TION OF MENTALLY ILL (1988)		
MARYLAND	Y	Y, U/L INADVISABLE	MD. ANN. CODE, HEALTH GEN., SEC. 7-602(1982)		
MASSACHUSETTS	Y	REFUSE SHOCK & LOBO.	ALM GL c123 sec. 23 (1986)		
MICHIGAN	Y	REFUSE SURGERY & SHOCK	M.C.L.A. SEC. 330.1716 (1980)		
MINNESOTA	Y	Y, OTHER THAN FOR MENTAL ILLNESS	M.S.A. SEC. 2538.03 (SUPP. 1989)	CONSENT NEEDED FOR PSYCHOTROPIC MED.	M.S.A. sec. 2538.03

MISSISSIPPI					
MISSOURI	Y	CONSENT NEEDED FOR HAZARDOUS TREAT. RT. TO REFUSE ELECTROCONV. THERAPY	V.A.M.A. sec. 630.115(1978) V.A.M.S. sec. 630.130(1978)	CONSENT NEEDED	V.A.M.S. SEC. 630.115 (1978)
MONTANA	Y	CONSENT FOR UNUSUAL OR HAZ. TREAT.	MONT. CODE ANN. SEC. 53-20-146(1987)	CONSENT NEEDED	MONT. CODE ANN. SEC. 53-20-147 (1987)
NEBRASKA	Y	Y, U/L EMERGENCY	R.R.S., 1943 SEC. 83-1066 (SUPP. 1988)		
NEVADA	Y	CONSENT BEFORE ANY TREATMENT	N.R.S. 433.484		
NEW HAMPSHIRE					
NEW JERSEY	Y	FREE FROM UNNEC. EXCESS. MED.	N.J.S.A. 30:4-24.2	CONSENT NEEDED	N.J.S.A. 30:4-24.2

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
NEW MEXICO	Y	PSYCHO- TROPIC MED. IF NECESSARY PROTECT	sec. 43-1-15		
NEW YORK	Y	CONSENT FOR SURG., SHOCK, EXPERMT.	N.Y.MENTAL HYGIENE LAW SEC. 33.03 (McKINNEY SUPP.1986)	CONSENT NEEDED	N.Y. MENTAL HYGIENE LAW SEC. 33-03 (McKINNEY SUPP. 1986
NORTH CAROLINA					
NORTH DAKOTA	Y	FREE FROM UNNEC.MED.	sec. 25-03.1-01	CONSENT NEEDED	sec. 25-03.1-01
OHIO	Y	FREE FROM UNNEC. OR EXCESSIVE MED.	OHIO REV.CODE ANN. SEC. 5122.27	CONSENT FOR UNUSUALLY HAZARDOUS TREAT.	OHIO REV.CODE ANN. [SEC. 5122.27.1] SEC. 5122.271 (1982)
OKLAHOMA					

OREGON	Y	FREE FROM UNUS. OR HAZ. TREAT.	SEC. 426.385	CONSENT FOR UNUSUAL HAZ. TREATMENT	SEC. 426.385
PENNSYLVANIA					
RHODE ISLAND	RT.TO RECEIVE NEC. CARE	R.I.GEN.LAWS SEC. 40.1-5.3-14 (SUPP.1988)	CONSENT NEEDED	R.I.GEN.LAWS SEC. 40.1-5.3-13(1988)	
SOUTH CAROLINA	Y	Y, IF NOT RECOGNIZED AS STAND.TREAT.	S.C.CODE SEC. 44-23-1010(1985)		
SOUTH DAKOTA	Y	YES	SDCL TITLE 27B-8-2(1979)	CONSENT NEEDED	SDCL TITLE 27A-12-20, TITLE 27B-8-20 (1979)
TENNESSEE	Y	RT.TO GIVE CONSENT	SEC. 33-3-104		
TEXAS	Y	FREE FROM UNNEC. EXCESS. MED.	VERNON'S ANN.CIV.ST. art. 5547-300	PROHIBITED	VERNON'S AN.CIV.ST. ART. 5547-300

STATE	STATUTORY SCHEME	RIGHT TO REFUSE MEDICATION	CITATION	EXPERIMENTAL MEDICATION PRMITTED?	CITATION
UTAH					
VERMONT					
VIRGINIA	Y	IF NECESS. TO PROTECT U/L CT. ISSUES STAY	VA.CODE SEC. 37.1-85(1983)	CONSENT NEEDED	VA.CODE SEC. 37.1-84.1 (1983)
WASHINGTON	Y	SHOCK & SURG. TREATMENT	RCWA 71.05.370		
WEST VIRGINIA					
WISCONSIN	Y	Y	W.S.A. 51.61	CONSENT NEEDED	W.S.A. 51.61
WYOMING					

LOUISIANA STATUTORY PROVISIONS

Louisiana Revised Statutes, Title 15 section 830

TREATMENT OF MENTALLY ILL AND MENTALLY RETARDED INMATES

A. The department may establish resources and programs for the treatment of mentally ill and mentally retarded inmates, either in a separate facility or as part of other institutions or facilities of the department.

B. On the recommendation of appropriate medical personnel and with the consent of the Department of Health and Human Resources or other appropriate department, the secretary of the Department of Corrections may transfer an inmate for observation and diagnosis to the Department of Health and Human Resources or other appropriate department or institution for a period not to exceed the length of his sentence. If the inmate is found to be subject to civil commitment for psychosis or other mental illness or retardation, the secretary of the Department of Corrections shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and shall be paid by the state. While the inmate is in such other institution his sentence shall continue to run.

C. When, in the judgment of the administrator of the institution to which an inmate has been transferred, he has recovered from the condition which occasioned the transfer, he shall be returned to the department, unless his sentence has expired.

Added by Acts 1968, No. 192, section 1. Amended by Acts 1980, No. 609, section 1, eff. July 23, 1980.

Louisiana Revised Statutes, Title 15, section 830.1

**REFUSAL OF TREATMENT BY MENTALLY ILL OR
MENTALLY RETARDED INMATES.**

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department

of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

Amended by Acts 1972, No. 154, section 1; Acts 1977, No. 714, section 1; Acts 1978, No. 680, section 1; Acts 1978, No. 782, section 1, eff. July 17, 1978; Amended by Acts 1987, No. 96, section 1.

Louisiana Revised Statutes, Title 28 section 171

ENUMERATIONS OF RIGHTS; RESTRICTIONS

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director

of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff

of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of a treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in this medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treatment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts of behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorney provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient.

The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medication which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for non-medical reasons such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall

enter into the person's record his response to medical treatment, his current mental status and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

Louisiana Code of Criminal Procedure Art. 641

MENTAL INCAPACITY TO PROCEED DEFINED

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Louisiana Code of Criminal Procedure Art. 642

HOW MENTAL INCAPACITY IS RAISED; EFFECT

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Louisiana Code of Criminal Procedure Art. 647

DETERMINATION OF MENTAL CAPACITY TO PROCEED

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Source: New; cf. former R.S. 15:267; A.L.I. Model Penal Code, section 4.06(1) (Tent. Draft No. 4, 1955). Acts 1966, No. 310, section 1.

Louisiana Code of Criminal Procedure Art. 648

PROCEDURE AFTER DETERMINATION OF MENTAL CAPACITY OR INCAPACITY

A. The criminal prosecution shall be resumed if the court determines that defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of

capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R. S. 28:2 (28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall maintain in custody at a forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall custody, care, and treatment exceed the time of the maximum sentence the defendant could have received if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from the state correctional institutions.

Amended by Acts 1982, No. 495, section 1; Acts 1983, No. 399, section 1; Acts 1987, No. 928, section 1, eff. July 20, 1987; Acts 1988, No. 383, section

**In the
Supreme Court of the United States**

October Term, 1989

MICHAEL OWEN PERRY

Petitioner,

vs.

STATE OF LOUISIANA

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF LOUISIANA**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is a mentally ill death row inmate competent to be executed if, because of treatment with prescribed medication, he is aware of his impending execution and the reason for it?
2. May a state administer prescribed medication to a mentally ill death row inmate without his consent in order to achieve and maintain his competency to be executed?
3. If competency to be executed may be achieved and maintained with nonconsensual medication, what, if any, procedures are required prior to such medication by the Due Process Clause of the Fourteenth Amendment?

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No. 89-5120

**In the
Supreme Court of the United States**

October Term, 1989

MICHAEL OWEN PERRY

Petitioner,

vs.

STATE OF LOUISIANA

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This criminal case is before the Court on a writ of certiorari to the Louisiana Supreme Court for review of state post-conviction competency proceedings. Petitioner, Michael Owen Perry, is a Louisiana death row inmate who has a history of mental illness. At the suggestion of the Louisiana Supreme Court in its opinion affirming Perry's conviction and sentence, the state district court initiated proceedings to determine Perry's competence to be executed. Following appointment of a sanity commission and several evidentiary hearings, the district court found Perry competent to be executed and authorized prison officials to medicate Perry without his consent in order to maintain his competence. The Louisiana

Supreme Court denied review of the district court's ruling, and this Court granted Perry's petition for writ of certiorari.

Background

The evidence underlying Perry's conviction and sentence of death is summarized by the Louisiana Supreme Court in its opinion on appeal, *State v. Perry*, 502 So.2d 543 (La. 1986), which is reproduced in the Joint Appendix. (J.A. 1-44). Briefly, the facts are as follows. On a Sunday morning in the summer of 1983, Perry entered the home of his cousins, Randy Perry and Bryan LeBlanc, and killed them as they slept. (J.A. 3, 41). He then walked the short distance to his parents' home and broke into the house. (J.A. 3-4). When his parents, Chester and Grace Perry, arrived home from an out-of-town trip with their two-year-old grandson, Anthony Bonin, Perry was waiting for them. *Id.* He immediately shot and killed his parents and the child. (J.A. 4). Following the murders, Perry stole money belonging to his parents and fled in his parents' car to Washington, D.C., where he was arrested two weeks later. (J.A. 4-6).

Prior to Perry's trial for the murders of his family, the trial court conducted an inquiry into Perry's mental capacity to proceed. (J.A. 7). The court appointed a sanity commission composed of Drs. Louis E. Shirley, Jr., and Young Hee Kang, both general practitioners with limited experience in psychiatry. *Id.* The physicians examined Perry but did not render an opinion as to his competence to proceed to trial. *Id.* On recommendation of the commission, Perry was committed to the Feliciana Forensic Facility for evaluation and treatment. *Id.* During his stay at the institution, Perry was diagnosed as schizoaffective and was treated with Haldol, a neuroleptic medication.¹ (R. 511, 519-20, 534, 593).²

¹Neuroleptic, or antipsychotic, drugs are used to control the symptoms of psychotic illnesses such as schizoaffective disorder. Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence" and "Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication," 12 Hofstra L. Rev. 77, 79 (1983). Antipsychotics constitute a subclass of the psychotropic family of medication which includes all drugs which affect mental activity. *Id.*

²With the exception of medical records introduced as exhibits, all portions of the record which are referred to in this Brief and which are not contained in the Joint Appendix are reproduced in Appendix A.

After Perry was released from the Feliciana facility, a second sanity commission was appointed to evaluate his mental capacity. (J.A. 7). Drs. Shirley and Kang were again appointed to the commission along with Dr. Aretta J. Rathmell, a practicing psychiatrist. *Id.* This time, after examining Perry, the commission was unanimous in its opinion that Perry was competent to stand trial. *Id.* The district court agreed. (J.A. 8). Consequently, Perry proceeded to trial.

At trial, Perry was found guilty as charged of five counts of first degree murder. (J.A. 1). During the penalty phase of the trial, defense counsel urged the jury to consider Perry's mental condition as a mitigating factor in sentencing. (J.A. 38). The jury nevertheless recommended that Perry be sentenced to death on each of the five counts. (J.A. 1). The jury based its recommendation on its finding of two aggravating circumstances: Perry knowingly created a risk of death or great bodily harm to more than one person, and the murders were committed in an especially heinous, atrocious or cruel manner. (J.A. 1-2). In accordance with the recommendation of the jury, Perry was sentenced to death. (J.A. 2).

On appeal to the Louisiana Supreme Court, Perry's conviction and sentence were affirmed. (J.A. 3). In reviewing the conviction, the state's high court found, among other things, that the "weight of the evidence supports the trial court's determination of competency." (J.A. 11). With regard to Perry's sentence, the court affirmed the jury's rejection of Perry's mental condition as a mitigating circumstance:

Defense counsel argues the mitigating circumstances were apparently overlooked by the jury. We find the conflicting medical testimony on defendant's mental condition was provided to the jury and the jurors chose to believe the State's experts, that the defendant did not suffer from a mental disorder so overwhelming that he was insane or unable to control or understand his actions.

(J.A. 38). In addition, the court held that the death penalty "is proportionate to the offenses and to this particular defendant." (J.A. 41).

In concluding its opinion, the state Supreme Court offered the following guidance on the issue of post-conviction incompetence:

The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. . . . Defendant's burden is to show by a preponderance of evidence that he lacks the present capacity to undergo execution. . . . We have determined the defendant was capable of proceeding at trial. A similar review might be in order prior to execution.

(J.A. 43-4). This Court denied Perry's petition for writ of certiorari to review the decision of the Louisiana Supreme Court. *Perry v. Louisiana*, ___ U.S. ___, 108 S.Ct. 205 (1987), *reh'g denied*, ___ U.S. ___, 108 S.Ct. 511 (1987).

Post-Conviction Competency Proceedings

Following the suggestion of the Louisiana Supreme Court, the state district court initiated proceedings to determine Perry's competence for execution. (J.A. 45-6). In accordance with the state procedure for determining pre-trial competence to proceed, *see* La. C.Cr.P. arts. 642-649.1 (reproduced in Appendix B), the court appointed a sanity commission to evaluate Perry's mental capacity. (J.A. 45-46). The commission was composed of two psychiatrists: Dr. Theresita Jimenez, Perry's treating physician during his pre-trial confinement at the Feliciana Forensic Facility as well as the State's expert in the penalty phase of the trial, and Dr. Aris Cox, Perry's treating psychiatrist on death row. (R. 509, 546; J.A. 10, 45).

Perry, represented by counsel, moved for the appointment of a psychologist to the sanity commission. (J.A. 46). The court granted the motion, allowing Perry and respondent, the State of Louisiana, the opportunity to recommend psychologists for appointment to the commission. *Id.* Perry's counsel recommended appointment of psychiatrist Dr. Glen Estes and psychologist Dr. Curtis Vincent. (R. 19). Dr. Vincent had examined Perry in 1983 when Dr. Vincent was a clinical psychologist at the Feliciana Forensic Facility. (R. 587, 593). Dr. Estes had not previously treated or evaluated Perry. (R. 649). Accepting Perry's recommendations, the court appointed Dr. Estes and Dr. Vincent to serve on the sanity commission along with Drs. Jimenez and Cox. (J.A. 46).

After its appointment of the sanity commission, the court

granted an *ex parte* motion filed by Keith B. Nordyke, one of Perry's lawyers, for delegation of decision-making authority and appointment as "Do-Gooder" for Perry. (R. 186-88; J.A. 47). The court appointed Nordyke "as defendant's representative in these criminal proceedings authorized to make decisions on behalf of defendant as deemed necessary and in best interest of Michael Owen Perry." (J.A. 47). On March 14, 1988, pursuant to the authority granted by the district court and without notice to the State, Nordyke instructed the state prison authorities to remove Perry from all psychotropic medication. (R. 91, 184). Prior to that time, Perry was apparently voluntarily taking Haldol as prescribed by his treating psychiatrists. (R. 518, 554, 594).

The members of the sanity commission separately examined Perry in February and early March of 1988. (R. 509, 589, 637; J.A. 79). On April 20, 1988, the court conducted an evidentiary hearing on the issue of Perry's competency. (J.A. 47). At the hearing, Perry introduced various medical records (R. 539-40, 541-45) and called all four members of the sanity commission to testify (R. 505, 545, 579, 634). In addition, Perry took the stand in support of his claim of incompetence. (R. 661). Over the State's objection, the court allowed Perry's testimony to be videotaped and ordered the videotape made a part of the record in the case. (R. 660-61). At the conclusion of the hearing, the court took the matter under advisement and invited memoranda from the parties. (R. 691-92).

Shortly after the hearing, on April 29, 1988, Nordyke contacted Dr. Kay Kovac, medical director at the Louisiana State Penitentiary, regarding Perry's condition. (R. 714; J.A. 103). Nordyke authorized Dr. Kovac to administer psychotropic drugs to Perry whenever medically necessary. (J.A. 103).

Prior to issuing its ruling, the court requested that the Louisiana Department of Public Safety and Corrections provide the court with updated information on Perry's condition. (R. 698-99). Pursuant to this request, the Department submitted several documents regarding Perry's mental health: a letter and notes by Dr. Kovac, a report to Dr. Kovac from social worker Marie Hughes, notes by Ms. Hughes, and notes by social worker Randy Parent. (J.A. 100-106). Soon thereafter, on June 22, 1988, Perry filed an objection to admission of the documents into evidence. (R. 193-97). On the same day, Nordyke

again instructed authorities at the Louisiana State Penitentiary to discontinue treating Perry with medication. (R. 204).

On August 26, 1988, the court overruled Perry's objection to the evidence submitted by the Department of Public Safety and Corrections and ordered the evidence filed into the record. (J.A. 48). Based on that evidence, the court concluded that "there has probably been a change in the mental condition of the defendant." (R. 700). As a result, the court ordered Dr. Jimenez and Dr. Cox to re-examine Perry and to appear at a sanity hearing to be held on September 30, 1988. (J.A. 49). In addition, the court vacated its order authorizing Nordyke to make decisions for Perry and ordered that, pending the September hearing, Perry be treated and medicated "as to be determined by the medical staff of the Department of Public Safety and Corrections." (J.A. 49).

Perry applied to the Louisiana Supreme Court for supervisory writs to review the district court's orders. The state supreme court stayed the order authorizing forcible medication but refused to stay the September hearing. (R. 305, 314).

At the September hearing, the court called Dr. Cox and Dr. Kovac to testify. (R. 713, 735). Dr. Jimenez was unable to appear at the hearing due to illness. (R. 712). Consequently, the court scheduled a third competency hearing in order to allow Dr. Jimenez to testify. (R. 747). Following Dr. Jimenez's testimony at the third and final hearing on October 21, 1988, the court asked Nordyke whether he wanted to present any evidence on Perry's behalf. (J.A. 125). Nordyke declined the court's invitation. *Id.*

Evidence

The medical experts agree that Perry suffers from schizoaffective disorder, a mental illness which affects both mood and thought. (R. 511-12; J.A. 78, 89, 94). As explained by Dr. Cox and Dr. Jimenez, schizoaffective disorder is characterized by symptoms such as mood swings, paranoia, disorganized thinking, delusions and hallucinations. (R. 514, 559; J.A. 70-71). The illness is incurable and can be managed only with medication. (R. 513; J.A. 81). Antipsychotic drugs, such as Haldol, can be used to control the symptoms of schizoaffective disorder; such medication reduces delusions, hallucinations, and paranoia and improves concentration and

cohesiveness of thought. (R. 518-19, 567-69).

As a result of his mental illness, Perry sometimes has diminished contact with reality. (R. 615; J.A. 80, 94). For example, he has repeatedly expressed a belief that he is god and that, since the age of seven, he has been married to a woman named Susan Bordelon. (R. 592, 641; J.A. 71, 94-96). He has also claimed that he hears voices. (R. 592-93, 663; J.A. 59-60). In addition, Perry's thoughts are sometimes rambling and disorganized; as demonstrated by his testimony at the April hearing, he jumps from one topic to another without direction or cohesion. (R. 515, 590-91, 670-71). At times, he is ambivalent and relates inconsistent information; for example, he has on several occasions both denied and admitted that he murdered his family. (R. 511, 629, 667; J.A. 92).

Perry's mental condition improves with medication. (R. 520, 553-55, 561; J.A. 100-102). As explained by Dr. Cox, when Perry is treated with psychotropic medication, he is less hostile, his thinking is more rational and coherent, and he is in better contact with reality. (R. 568-69). Although Perry has developed some minor side effects from the medication, such as stiffness and drooling, he has not exhibited signs of the more serious tardive dyskinesia. (R. 573-74; J.A. 72-73). Moreover, according to Dr. Jimenez, Perry has exaggerated the side effects. (J.A. 72-73). With the exception of Dr. Estes, the members of the sanity commission recommended that Perry be treated with neuroleptic medication. (R. 554-55, 616; J.A. 70, 88). Dr. Estes was not "prepared to recommend a course of treatment." (J.A. 94-95).

At the competency hearings, each of the members of the sanity commission expressed an opinion as to Perry's understanding of his death sentence. Dr. Jimenez repeatedly testified that Perry "does understand that he's convicted of the death of his family and he does understand that the penalty is death." (J.A. 72-73, 77, 122-23). Dr. Cox likewise found that Perry "was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and . . . he was aware of why he was on death row." (J.A. 115-16, 85-86). According to Dr. Cox, Perry's competence depends on his medication: "[w]hen he's on medication I think he's competent, when he's not I don't think he is." (R. 571). Dr. Vincent expressed some doubt as to Perry's understanding that he committed the murders. (J.A. 92). Dr. Vincent concluded, however, that Perry understood that

he would be executed if found competent to proceed and that Perry also understood "that if an individual murders somebody[,] they can be found guilty and then could be executed legally." (J.A. 91-92). Dr. Estes, the only member of the sanity commission to examine Perry only once, opined that "Perry is not completely aware of the nature of the current proceedings against him. . . . He does not understand his sentence as punishment for what he did wrong." (J.A. 63).

Decision of the State Court

At the conclusion of the October hearing, the district court issued its ruling. (J.A. 126-147). The court held that the procedural requirements of La. C.Cr.P. arts. 641-649.1, *see* Appendix B, regarding pre-trial determinations of mental capacity to proceed also apply to inquiries into post-conviction competency. (J.A. 131). Because Louisiana law is silent with respect to the substantive standard governing determinations of competency to be executed, the court adopted the standard articulated by Justice Powell in *Ford v. Wainwright*, 477 U.S. 399 (1986): "the State is prohibited from executing those who are unaware of the punishment they are about to suffer and why they are to suffer it." (J.A. 128-30, 141). Applying that standard to the evidence, the court found that "the defendant is competent for execution. It is further obvious from the testimony that he is competent only while maintained on psychotropic medication in the form of Haldol." (J.A. 145).

Having found that medication is an essential prerequisite to Perry's competence, the court turned to the issue of nonconsensual medication. *Id.* The court observed that "the right to refuse medical treatment has been specifically recognized as a subject of constitutional protection." (J.A. 139). Nevertheless, the court concluded that the State's interest in carrying out the death penalty outweighs Perry's liberty interest in being free from unwanted medication:

Louisiana's interest in the execution of [the] jury's verdict override [sic] those rights of Mr. Perry. The State is entitled to have that judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurpation [sic] of the criminal laws

(J.A. 146). Accordingly, the court ordered that "the Louisiana Department of Public Safety and Corrections . . . maintain the defendant on [antipsychotic] medication as to be prescribed by the medical staff of said Department and if necessary . . . administer said medication forcibly to defendant and over his objection." (J.A. 148-49).

The court stayed execution of its judgment in order to allow Perry the opportunity to seek review in the Louisiana Supreme Court. (R. 794). The state's high court denied review of the district court's ruling. *State v. Perry*, 543 So.2d 487 (La. 1989), *reh'g denied*, 545 So.2d 1049 (La. 1989). (J.A. 150-51). Petitioner now seeks relief from that decision of the Louisiana Supreme Court.

SUMMARY OF THE ARGUMENT

1. The state court correctly found that, when treated with antipsychotic medication, Perry is competent to be executed. The evidence presented at the competency hearings demonstrates that, as long as he is medicated, Perry understands that he has been convicted of the murders of five members of his family and that, as a result, he has been sentenced to die. Thus, when Perry is maintained on medication his understanding of his sentence of death satisfies the Eighth Amendment competency standard articulated by Justice Powell in *Ford v. Wainwright*, 477 U.S. 399 (1986). Neither the Eighth nor the Fourteenth Amendment requires application of a broader standard of incompetency. In the first place, a majority of this Court held in *Ford* that the Eighth Amendment does not provide mentally ill prisoners with more protection than suggested by Justice Powell. *Ford*, 477 U.S. 399 (Powell, J., concurring in part and concurring in the judgment); *id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). There is no reason now for this Court to expand the Eighth Amendment's prohibition of execution of the insane beyond the limits recognized in *Ford*. Secondly, Louisiana has not created a liberty interest which is protected by the Fourteenth Amendment in application of a definition of insanity which is more expansive than that set out in *Ford*. Because Louisiana law is silent with regard to the substantive standard applicable to claims of incompetency to be executed, a state prisoner cannot claim a justifiable expectation in application of any particular standard of incompetency.

2. The state court order authorizing medication of Perry without his consent does not violate the Eighth Amendment. The record is replete with evidence of the benefits to Perry of antipsychotic medication. Because such medication is actually good for Perry, it cannot reasonably be considered cruel and unusual punishment. In fact, because Perry is incompetent to make his own treatment decisions, under the doctrine of *Estelle v. Gamble*, 429 U.S. 97 (1976), the State is *required* to treat Perry with neuroleptic medication, with or without his consent, in order to relieve the suffering caused by his mental illness. In any case, regardless of the benefits to Perry of antipsychotic medication, the use of medication to produce competency does not violate the Eighth Amendment. First, there is no national consensus against the use of appropriate psychiatric treatment to restore competency for execution. Second, by allowing the State to carry out validly imposed death sentences, treatment of death row inmates which produces competency for execution serves the fundamental penological goals of retribution and deterrence. Third, medication of condemned prisoners is not disproportionate punishment for the crime of first degree murder. In this case in particular, such treatment is amply justified by Perry's merciless killings of five members of his family.

3. Perry does not have a Fourteenth Amendment right to refuse the medication authorized by the state court. Without question, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to effectuate the death penalty. Thus, the due process right to refuse medication recognized in *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990), does not extend to death row inmates who require medication to be competent for execution. Also, because Louisiana law does not use explicitly mandatory language to limit the circumstances under which a prisoner can be treated with antipsychotic medication, Perry cannot claim a constitutional entitlement based on Louisiana law to avoid the medication at issue. Finally, assuming *arguendo* that either the Due Process Clause or Louisiana law does create a liberty interest in refusing medication which produces competency for execution, that interest is overridden by the State's interest in carrying out the death penalty.

4. The state court's conduct of adversarial hearings on the issue

of competency, accompanied by the full array of attendant procedural protections, more than satisfied the procedural demands of the Fourteenth Amendment. Any failure of the state court to comply with procedures mandated by Louisiana law is irrelevant to the due process analysis. Moreover, because Perry's counsel had ample opportunity to refute the evidence submitted by the Department of Public Safety and Corrections, the court's consideration of that evidence did not violate the Due Process Clause.

ARGUMENT

I. Michael Owen Perry is competent to be executed because, when on his prescribed medication, he is aware of the penalty he is to suffer and he understands the reason he is to suffer that penalty.

Perry understands that he has been sentenced to death for the murders of five members of his family. As a result, he is competent to be executed; *Ford v. Wainwright*, 477 U.S. 399 (1986), does not require more. Moreover, contrary to Perry's assertions, Louisiana has not vested him with a constitutionally protected liberty interest in application of a competency standard which is stricter than that enunciated in *Ford*.

A. Under *Ford v. Wainwright*, 477 U.S. 399 (1986), mentally ill prisoners are incompetent to be executed only when their understanding of their sentence of death is impaired.

In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that the Eighth Amendment proscribes execution of the insane. In line with its prior decisions, the Court explained that the Eighth Amendment prohibits punishments which were considered cruel and unusual at the time the Bill of Rights was adopted as well as punishments which are contrary to "evolving standards of decency." *Id.* at 406, *quoting Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). Thus, in reaching its decision, the Court examined both common law and contemporary views toward executing the insane. The Court found that execution of the insane was prohibited at common law and remains prohibited in every state in the union. Accordingly, the Court concluded that "the Eighth Amendment prohibits a State from

carrying out a sentence of death upon a prisoner who is insane." *Id.* at 409-10.

The *Ford* majority opinion did not define insanity for purposes of the Eighth Amendment ban on executing the insane. Justice Powell, however, in a concurring opinion, specifically addressed the issue of what constitutes insanity in this context. Justice Powell pointed out, as did the majority, that a number of explanations have been advanced as justifying the common law rule against execution of the insane. One theory is "that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf." *Id.* at 419 (Powell, J., concurring in part and concurring in the judgment). In light of the expansive procedural protections now afforded defendants, Justice Powell dismissed that theory as having only "slight merit today." *Id.* at 420. On the other hand, Justice Powell recognized that "[t]he more general concern of the common law—that executions of the insane are simply cruel—retains its vitality." *Id.* at 421. He explained:

It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose.

Id. In accordance with those concerns, Justice Powell concluded that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.

Justice Powell's standard for determining competency to be executed does not distinguish between treated and untreated inmates. The standard is explicitly framed in terms of the condemned inmate's *awareness* of his sentence of death and the reasons for it; the standard thus focuses on the inmate's understanding, not on his diagnosis or treatment. Justice Powell explained that the Eighth Amendment's proscription of execution of the insane serves two purposes: "[i]f the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing." *Id.* Without

question, those objectives are satisfied as long as a death row inmate understands his sentence of death, regardless of whether his understanding is produced with medication. Indeed, Justice Powell implicitly recognized that competency achieved through medical treatment satisfies the Eighth Amendment requirement: "[i]t is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him." *Id.* at 425 n.5.

It is the State's position that Justice Powell's standard governs claims of incompetency to be executed under the Eighth Amendment. Although Justice Powell was the only member of the *Ford* majority to expressly adopt that standard, the other members of the majority implicitly recognized the same standard in Justice Marshall's plurality opinion: "[i]t is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417 (plurality opinion). Moreover, Chief Justice Burger and Justices Rehnquist, White and O'Connor rejected entirely the notion that the Eighth Amendment offers the insane shelter from execution. *Id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). Thus, a majority of the Court explicitly refused to recognize an Eighth Amendment right more expansive than that outlined by Justice Powell. Justice Powell's opinion therefore defines the outer limits of the Eighth Amendment right recognized in *Ford*. Additionally, it is significant that this Court has recently quoted Justice Powell's standard in referring to the holding in *Ford*: "under *Ford v. Wainwright*, 477 U.S. 399 (1986), someone who is 'unaware of the punishment they are about to suffer and why they are to suffer it' cannot be executed. *Id.* at 422 (Powell, J., concurring in part and concurring in judgment)." *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 2954 (1989). See also *Lowenfield v. Butler*, ___ U.S. ___, ___, 108 S.Ct. 1456, 1457 (1988) (Brennan, J., dissenting from denial of application for stay of execution); *Johnson v. Cabana*, ___ U.S. ___, ___, 107 S.Ct. 2207, 2208 (1987) (Brennan, J., dissenting from denial of petition for writ of certiorari and denial of application for stay of execution).

Noting that this Court has not explicitly established a standard

for determining competency to be executed, Perry urges this Court to adopt a definition of insanity which is more expansive than that articulated by Justice Powell. In particular, Perry maintains that "[t]he definition of competency [to be executed] should . . . include a requirement that the inmate's competency be stable and predictable" as well as a requirement that the condemned inmate "be able to provide meaningful assistance in the defense of his life." Brief for Petitioner at 50, 55. However, as explained above, Justice Powell's standard represents the outer boundaries of the Eighth Amendment prohibition against executing the insane. While the Eighth Amendment may require *less* in this context than suggested by Justice Powell, a majority of this Court has held that it does not require *more*. *Ford*, 477 U.S. 399 (Powell, J., concurring in part and concurring in the judgment); *id.* (O'Connor, J., concurring in the result in part and dissenting in part); *id.* (Rehnquist, J., dissenting). Moreover, as explained below, there is no reason for this Court to expand the protection of the Eighth Amendment as Perry advocates.

Perry's first suggested addition to Justice Powell's standard is a requirement that competency for execution be "stable and predictable." Brief for Petitioner at 50. According to Perry, such a standard would ensure competency at the time of execution and would avoid repeated evidentiary hearings to evaluate changes in a condemned inmate's mental condition. However, Perry's proposed requirement of stable and predictable competency for execution is both unnecessary and unworkable. In the first place, Perry fails to elaborate on the meaning of "stable and predictable" competency. Thus, it is unclear whether the standard posed by Perry would actually serve as an effective protection against execution of the insane. Moreover, Perry's insistence on predictable competency demands the impossible. Regardless of the degree of stability and predictability required for a finding of competency, no competency standard can eliminate the possibility of post-hearing deterioration of a death row inmate's condition; after a determination of competency, there is *always* the possibility that the inmate's condition will change before execution. Hence, in order to cure the flaw Perry imagines in the *Ford* standard, this Court would have to outlaw the death penalty altogether. Furthermore, the defect Perry claims to find in Justice Powell's standard is nonexistent. Because a death row inmate is entitled to repeatedly raise a claim of incompetency up until the

moment of his execution, he is amply protected by Justice Powell's standard even if his condition deteriorates following a determination of competency. So, even assuming, as Perry contends, that his competency changes unpredictably from day to day, he is adequately protected by the *Ford* standard because he can raise the issue of incompetency on each "bad day." Brief for Petitioner at 51.

Although Perry expresses concern that Justice Powell's standard invites repeated competency hearings, the possibility of repeated hearings is irrelevant to the Eighth Amendment analysis; the Eighth Amendment cannot be construed to exempt death row inmates from execution merely because of an anticipated burden on the judicial system. While the prospect of repeated competency hearings might justify statutory limitations on the State's right to enforce the death penalty, that prospect is not a legitimate ground for constitutionalizing an expansive definition of insanity.³

Perry secondly seeks recognition of an Eighth Amendment prohibition against executing capital offenders who are unable to assist in their defense. However, no such limitation on the death penalty can be found in the Eighth Amendment. As the majority in *Ford* pointed out, there is no uniform rationale underlying the proscription of executing the insane; both at common law and today, several theories have been advanced as justifying the rule.⁴ *Ford*, 477

³Moreover, the specter of multiple hearings on an inmate's competency is plainly illusory. In order to trigger the right to a competency hearing, a Louisiana capital offender must demonstrate "a reasonable ground to believe he is presently insane." *Perry*, 502 So.2d at 564 (J.A. 43-44). See also *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment). Thus, an inmate who has been found competent cannot provoke a subsequent competency hearing unless he makes a threshold showing that his condition has deteriorated to the point of incompetency. It is unlikely then that a condemned prisoner will be entitled to repeated competency hearings.

⁴The *Ford* majority opinion quotes Blackstone's explanation of the common law ban on executing the insane: "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." *Ford*, 477 U.S. at 407, quoting 4 W. Blackstone, Commentaries *24-*25. Notably, however, that rationale is conspicuously absent from the Court's discussion of the reasons for the rule against executing the insane. See *Ford*, 477 U.S. at 407-410.

U.S. at 407-410. Consequently, there is no contemporary or historical consensus that a prisoner should not be executed unless he is able to assist in his defense. Indeed, Justice Powell's standard, which does not require such ability, is the "prevailing test" among the states. *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment). That standard is therefore consistent with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In short, execution of prisoners who are unable to assist in their defense has never been uniformly viewed as cruel and unusual punishment. As a result, execution of such criminal offenders is not prohibited by the Eighth Amendment. See pp. 33-35, *infra*.

In addition, as recognized by Justice Powell, a requirement that a death row inmate be able to assist in his defense is of limited utility in light of the expansive procedural protections now afforded criminal defendants: "[t]hese guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free." *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment). Moreover, as Justice Powell explained, because due process requires that defendants be competent to stand trial, "the notion that a defendant must be able to assist in his defense is largely provided for. See *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)." *Id.* at 421 (footnote omitted). It is certainly difficult to conceive of a situation in which a mitigating fact or argument which was overlooked by a competent criminal defendant and his counsel at the trial stage would suddenly come to the attention of the defendant prior to execution.

Finally, the danger of executing an individual who may discover or remember a fact or argument in avoidance of the death penalty is not limited to mentally ill inmates. Even "perfectly sane inmates, given enough time, might be able to develop new defenses or devise better appeals." Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla.St. U.L. Rev. 35, 50 (1986). Moreover, even sane inmates may fail to recognize the significance of important information or may forget relevant facts. Thus, the only way of guarding against executing an individual who may one day discover

an argument which would save him from execution is to eliminate the death penalty entirely. Such certainty is clearly not required by the Eighth Amendment.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding execution while incompetent which is greater than the right recognized in *Ford v. Wainwright*, 477 U.S. 399 (1986).

Perry maintains that Louisiana has adopted a standard of competency which is stricter than the standard enunciated by Justice Powell and which enjoys the protection of the Fourteenth Amendment. Specifically, Perry asserts that La. C.Cr.P. art. 641 establishes the Louisiana substantive standard for judging claims of incompetency to be executed and creates a constitutionally protected liberty interest in application of that standard. That argument reflects a misunderstanding of both Louisiana law and Fourteenth Amendment doctrine.

La. C.Cr.P. art. 641 provides that "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." Relying on that provision, Perry contends that a Louisiana death row inmate is not competent to be executed unless he both understands his sentence of death as required by *Ford* and is able to "assist in his defense." *Id.* As recognized by the state court, however, Article 641 applies to determinations of "competency to stand trial," not competency for execution. (J.A. 129-30).

Article 641 is found in Louisiana Code of Criminal Procedure Title XXI, Chapter 1, entitled "Mental Incapacity to Proceed." See Appendix B. When read *in pari materia* with the remainder of the chapter, Article 641 cannot be reasonably interpreted as applying to claims of incompetency to be executed. For example, the Official Revision Comment to La. C.Cr.P. art. 642 notes that "[i]t is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense *should not be brought to trial* while that condition exists." La. C.Cr.P. art. 642 Official Revision Comment (emphasis added). Similarly, La. C.Cr.P. art. 648 provides that the court shall determine whether the "defendant [is] *incapable of standing trial*." La. C.Cr.P.

art. 648B(3) (emphasis added). Other references in the chapter's provisions and commentary likewise compel a conclusion that Article 641 applies only to determinations of competency to stand trial. See e.g., La. C.Cr.P. art. 642 ("there shall be no further steps in the criminal prosecution"); La. C.Cr.P. art. 642 Official Revision Comment ("present incapacity to stand trial is ordinarily urged by the defense"); La. C.Cr.P. art. 648B(1) ("treatment [shall not] exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged"); La. C.Cr.P. art. 649 Official Revision Comment ("The court's determination of the question of regained capacity to stand trial is in accord with [precedent]").

Despite the clear language of the Code, Perry insists that Article 641 applies to claims of incompetency to be executed. He argues that the Louisiana Supreme Court adopted the Article 641 standard as applicable in the post-conviction context in *State v. Allen*, 15 So.2d 870 (La. 1943), and in this case on direct appeal, *State v. Perry*, 502 So.2d 543 (La. 1986) (J.A. 1-44). Neither case, however, provides support for Perry's strained interpretation of Article 641.

In relying on *Perry* and *Allen*, Perry has apparently confused substance with procedure. In *Allen*, the Louisiana high court recognized that "[o]ne who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition." *Allen*, 15 So.2d at 871. The issue in *Allen* was solely a *procedural* one: whether the trial court erred in failing to appoint experts to evaluate the condemned prisoner's mental condition. *Id.* The court ruled that the procedures which govern claims of incompetency to stand trial should also be applied to claims of post-conviction insanity: "for the same reason that a person is entitled to a hearing before conviction on the question of his sanity, he is entitled to a hearing after conviction; and the same rules of *procedure* govern." *Id.* (emphasis added). The court did not rule, however, that the same *substantive* standards govern claims of pre-trial and post-conviction incompetency; the substantive issue was simply not before the court.

In *Perry*, the Louisiana Supreme Court suggested that an inquiry into Perry's competency "might be in order prior to execution." (J.A. 44). As in *Allen*, the court indicated that the *procedures* applicable to determinations of capacity to stand trial would govern such an

inquiry. (J.A. 43-4). But, with regard to the applicable substantive standard, not once did the court cite Article 641 or refer to a requirement that Perry be able to assist in his defense. *Id.* To the contrary, the court implicitly adopted the *Ford* standard: "[t]he State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and *lacks the capacity to understand the death penalty.*" (J.A. 43) (emphasis added).

From the above discussion, one thing is perfectly clear: Louisiana has not expressly adopted the Article 641 standard in the post-conviction context. As a result, Louisiana has not created a constitutionally protected liberty interest in application of that standard to claims of incompetency to be executed. This Court has explained that a state creates a liberty interest protected by the Fourteenth Amendment when state law uses "explicitly mandatory language in connection with requiring specific substantive predicates." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). Accord *Kentucky Department of Corrections v. Thompson*, ___ U.S. ___, 109 S.Ct. 1904 (1989). The Louisiana statutes obviously do not use "explicitly mandatory language" to apply Article 641 to determinations of post-conviction insanity. In fact, in *Perry*, the Louisiana Supreme Court implicitly rejected such an application of Article 641. (J.A. 43). At the very least, then, the Louisiana substantive standard for determining competency for execution is unclear. Consequently, Perry cannot claim a "justifiable expectation rooted in state law" that he will not be executed unless he is able to assist in his defense. *Montanye v. Haymes*, 427 U.S. 236, 242 (1976).

C. When Perry is on prescribed medication, his understanding of his sentence of death satisfies the *Ford v. Wainwright*, 477 U.S. 399 (1986), requirement of competency to be executed.

Applying Justice Powell's standard to this case, there can be little doubt that Perry is competent to be executed. Admittedly, Perry has a history of mental illness. Yet that illness did not render him incompetent to stand trial. (J.A. 11). Nor, in the jury's eyes, did it mitigate against application of the death penalty. (J.A. 38). Similarly, Perry's illness does not now prevent him, when properly treated, from understanding his sentence of death.

The state court correctly applied Justice Powell's standard and found that "it is obvious . . . that [Perry] is competent for execution." (J.A. 141, 145). That determination is entitled to substantial deference. As noted in *Stein v. New York*, 346 U.S. 156, 181 (1953), this Court will not overturn factual findings of a state court except to correct "miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do." Even a *de novo* review of the record, however, reveals overwhelming evidence that Perry understands his sentence of death.

Three of the four members of the post-conviction sanity commission indicated that Perry is aware of his impending execution and that he understands the reason for it.⁵ Of the commission members, Dr. Jimenez and Dr. Cox were firmest in their conclusions that Perry understands his sentence of death. Dr. Jimenez repeatedly testified that Perry knows that he is going to be put to death for the murders of his family. (J.A. 72-73, 77, 122-23). She stated in no uncertain terms that Perry "does understand that he killed his family and he does understand that he is getting the chair for that crime." (J.A. 77). Likewise, Dr. Cox concluded that, as long as Perry is treated with medication, he is competent to be executed. (R. 571). Dr. Cox testified that, when Perry was examined, he "was aware of the fact that he was under a sentence of death, that the process of electrocution could kill him and . . . he was aware of why he was on death row." (J.A. 115-16).

Although Dr. Vincent did not state his opinion regarding Perry's understanding of his death sentence as decisively, or as clearly, as Drs. Jimenez and Cox, his testimony reveals that Perry does understand his sentence of death. Dr. Vincent noted that, when Perry was examined, "he knew that he would be executed if he were found

⁵Perry's assertion that all of the members of the sanity commission found him incompetent, Brief for Petitioner at 45, is a gross mischaracterization of the experts' testimony. As explained in the text, only Dr. Estes found Perry incompetent under the *Ford* standard. While the other sanity commission members referred to Perry at times as "incompetent," their testimony reveals that all three found that Perry was aware of his impending execution and the reason for it. (J.A. 72-73, 85, 91-92; R. 628).

competent to proceed." (R. 590). Dr. Vincent further testified that Perry understands the functions of the court and "the charges." (R. 626, 628). When asked whether Perry understands the reasons for the death penalty, Dr. Vincent responded:

That's a much more difficult issue. I think he has the understanding that if an individual murders somebody [,] they can be found guilty and then could be executed legally. I think he understands that. I'm not really convinced that he understands that he did the murders. I think that varies tremendously.

(J.A. 92). In other words, Dr. Vincent doubted Perry's understanding of his guilt. He did not, however, question Perry's understanding of the connection between his conviction and his upcoming execution. To the contrary, Dr. Vincent testified that Perry knows the charges of which he was convicted, he knows that convicted murderers can be executed, and he knows that he will be executed if found competent. Considered as a whole, then, Dr. Vincent's testimony supports a conclusion that Perry is competent to be executed.

Dr. Estes was the only member of the sanity commission to conclude that Perry "is not completely aware of the nature of the current proceedings against him. . . . He does not understand his sentence as punishment for what he did wrong." (J.A. 63). In addition, Dr. Estes opined that Perry "failed to acknowledge the finality of his death sentence." *Id.* Dr. Estes did concede, however, that Perry knows that he is on death row and that, if found competent, he will be executed. *Id.*

Dr. Estes was also the only member of the sanity commission to examine Perry only once; his opinions are based on a single sixty-minute interview. (R. 649). Accordingly, when measured against the testimony of experts who saw Perry on numerous occasions, his testimony merits little weight. In contrast, the testimony of Dr. Jimenez and Dr. Cox, which is based on extensive experience in both evaluating and treating Perry, is entitled to great weight. Dr. Jimenez was Perry's treating physician during his pre-trial confinement at the Feliciana Forensic Facility. (R. 509). She also testified as the State's expert in the penalty phase of the trial. (J.A. 10). Dr. Cox was Perry's treating psychiatrist on death row. (R. 546). Thus, Dr. Cox and Dr. Jimenez were thoroughly familiar with Perry's case prior to their

appointment to the sanity commission. In addition, at the court's direction, Dr. Jimenez and Dr. Cox, unlike Drs. Vincent and Estes, re-examined Perry after the first sanity hearing. (J.A. 49, 114, 122-23). Following re-evaluation of Perry's condition, both confirmed their initial conclusion: Perry is aware of his impending execution and the reasons for it. (J.A. 115-16, 122-23).

Aside from the opinions of the sanity commission members, Perry's own words belie the contention that he is incompetent for execution. For example, Perry's statements to Dr. Kovac regarding his refusal to take his medication are particularly telling:

[Perry] went on to say that his attorney had instructed him not to take the medicine. And I said, well, you know, I understand but I think just for your best health we really need to talk about this because I think it's in your best health to take your medicine. And, uh, Mr. Perry said, no, my attorney has told me not to take my medicine. He said, it's just—it's very simple to understand, take my pills and die, don't take my pills and live. And he said, so, I'm not going to take my pills. . . . I'm not going to take my injections any more either. . . . [M]y attorney said this is going to go to the supreme court. And he said, I'm just not going to take any—I don't want any injections, I don't want any other medications.

(J.A. 113-14). Perry made substantively identical comments to Dr. Jimenez and to a hospital social worker. (J.A. 104-05, 123). In addition, Perry told the social worker that "he does not believe he is 'crazy' but if 'they' think he is, he will not get 'burned.'" (J.A. 104). Obviously, Perry is keenly aware that he is going to be put to death.

Perry's statement to Dr. Jimenez regarding Charles Manson even more clearly reveals his understanding of his sentence:

[Perry] talk[ed] about having seen a program about Charles Manson, and he was—he voiced some concerns about the picture and his opinions about that show. . . . It was about a show by *Geraldo*, and it was on Charles Manson, and he was questioning the fact as to why Charles Manson had people killed, or killed some people, and he was not being executed and why, why he, who only killed five people should be executed.

(J.A. 124). Certainly, these are not the words of someone "whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Ford*, 477 U.S. at 417 (plurality opinion).

In spite of the overwhelming evidence of his competency, Perry insists that he is not competent for execution because his mental condition changes rapidly and unpredictably even when he is on medication; he concludes that medication is unsuccessful "in achieving sustained or predictable competency." Brief for Petitioner at 24. That conclusion is simply without foundation in the record. The great bulk of the evidence, discussed above, reveals that Perry is competent for execution. But, as found by the district court, his competency is unquestionably dependent on his receipt of medication. (J.A. 145). Thus, Perry's competency changes when changes are made in his medication. There is no evidence, however, that Perry's competence varies while he is on medication. Dr. Cox, who originated the now familiar "moving target" reference, explained that Perry is a "moving target" because he responds rapidly to changes in his medication. (J.A. 81-82). Dr. Cox did *not* testify that Perry is a "moving target" when on medication. Rather, Dr. Cox made it perfectly clear that, as long as Perry is maintained on medication, he is competent to be executed.⁶ (R. 571). Hence, contrary to Perry's claim that his competency is ephemeral and unpredictable, Perry's competency is entirely sustainable and predictable with medication; it is only when Perry is removed from medication that his competency is unpredictable.⁷

In support of his claim of incompetency, Perry directs this Court to several portions of the record. First, he relies heavily on the medical records from the state penitentiary. (D.Ex. 5; R. 544-45).

⁶Dr. Cox does acknowledge that, because the medication does not take effect immediately, Perry has, at times, been incompetent even while on medication. (J.A. 80). See Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. Legal Med. 107, 110 n.15 (1985) ("after oral administration the maximum effect [of antipsychotic drugs] does not develop for several hours.")

⁷Interestingly, the instability of which Perry now complains is caused by his own refusal to take medication and by his counsel's actions in putting him on and taking him off medication. (R. 184, 204; J.A. 103).

Indeed, Perry's brief describes the day-to-day observations of his behavior from December 1985 to January 1988 in excruciating detail. Brief for Petitioner at 5-12. According to Perry, the medical records demonstrate that his competency is fleeting and unpredictable. Yet those records shed little light on the question of Perry's competency. Unlike the testimony of the sanity commission members, the medical records are not focused on the issue of Perry's understanding of his sentence of death. As a result, the bizarre behavior described in the records is, for the most part, irrelevant to the competency determination. For example, the fact that Perry feeds soap to the toilet or shaves his eyebrows does not indicate that he is incompetent to be executed. As explained by Dr. Cox, Perry can have psychotic symptoms and still remain aware of his sentence of death. (J.A. 83). Moreover, the medical records do not support Perry's contention that his illness is not controllable with medication. In fact, Perry's discussion of the medical records reveals that, each time he was hospitalized for medication, his condition quickly stabilized and he was promptly released from the hospital.⁸ Brief for Petitioner at 5-12.

⁸Admittedly, portions of the medical records seem to indicate that Perry decompensates even when on medication. However, several factors weigh against concluding from those portions of the record that Perry does not respond to medication. First, an indication in the record that Perry is receiving medication does not mean that he is receiving a proper dosage of medication. See Kessler & Waletzky, *Clinical Use of the Antipsychotics*, 138 Am. J. Psychiatry 202, 203 (1981) ("The most common cause of treatment failure in the management of an acute psychotic episode is prescribing an inadequate dose."). Both Drs. Cox and Jimenez have stated that Perry's medication requires adjustment. (R. 511; J.A. 115). Second, as explained by Dr. Vincent, even when the records indicate that medication was administered to Perry, one cannot be sure that Perry actually ingested the medication. (R. 594, 599). Thus, only when Perry was forcibly medicated is it certain that the medication was in fact in his system. Third, the timing and consistency of the medication must be taken into account in evaluating the effect of medication on Perry's condition. "The beneficial effect of [antipsychotic] drugs is temporary and generally does not last beyond the time the medication is eliminated from the bloodstream." *Kemna*, supra note 6, at 110 (footnote omitted). Short-acting Haldol is effective for, at most, eight to ten hours. (J.A. 116). So, it is not surprising that Perry sometimes decompensates within a day of receiving the short-acting form of medication. In contrast, injections of the long-acting Haldol D will remain

Second, Perry places great emphasis on Dr. Cox's testimony that Perry's competence is "relative" and that, even when medicated, Perry is never "completely coherent, well-intergraded [sic], rational." (J.A. 78, 84). Neither of these comments, however, supports a conclusion that Perry is not competent when medicated. In stating that Perry's competence is "relative," Dr. Cox specifically explained that Perry's competence depends on his medication: "[i]t has to do with the treatment Mr. Perry is receiving." (J.A. 78). Thus, read in context, Dr. Cox's statement regarding the relativity of Perry's competency directly contradicts Perry's assertion that he is incompetent even while on medication. Further, Perry can draw little support from Dr. Cox's opinion that Perry is never completely rational. The Constitution does not require that a condemned inmate be "completely" rational for execution; the Eighth Amendment requires only that death row inmates be aware of their impending execution and the reason for it. As Dr. Cox concluded, even though Perry is not completely rational, when medicated he does satisfy the Eighth Amendment competency requirement. (J.A. 85; R. 571).

Third, Perry points to his testimony at the April hearing as proof that he is incompetent for execution. However, at his counsel's instruction, Perry's medication was discontinued over a month before the hearing. (R. 184). Thus, thanks to Perry's counsel, Perry's testimony is absolutely useless in determining whether he is competent while medicated.

In sum, the evidence is clear that, when medicated, Perry is aware of the penalty he is to suffer and why he is to suffer it. As a result, Perry is competent to be executed.

effective for a month. (J.A. 118). However, it takes three months of medication with Haldol D supplemented by short-acting Haldol before a patient is stabilized. (J.A. 118-19). As noted by Dr. Cox, prior to the sanity hearings Perry had not been treated for three months with the long-acting Haldol and consequently he was never stabilized. (J.A. 118). Finally, as discussed at pages 28-29, the unanimous consensus of medical opinion is that Perry *does* improve with medication. Regardless of how Perry's attorneys view the medical records, none of the medical personnel who have had the opportunity to observe Perry both on and off medication doubt that Perry is competent when medicated.

II. Treating Perry with prescribed medication to maintain his competence for execution is not cruel and unusual punishment.

Perry maintains that the state court's order authorizing medication without his consent violates the Eighth Amendment.⁹ However, administration of antipsychotic medication to Perry is a legitimate response both to Perry's medical needs and to his claim of incompetency to be executed. Because medication with antipsychotic drugs is in Perry's medical interest, it cannot reasonably be considered cruel and unusual punishment. Moreover, medication of incompetent death row inmates is in accord with contemporary American views regarding treatment of death row inmates, furthers the State's penological interests in retribution and deterrence, and is consistent with the Eighth Amendment's proportionality requirement. Accordingly, such medication does not violate the Eighth Amendment.

A. Treating Perry with antipsychotic medication is beneficial to Perry and comports with the State's duty to provide prisoners with medical treatment.

Perry's brief presents a grim view of treatment with antipsychotic medication; indeed, Perry virtually equates such treatment with medical experimentation and torture. That characterization of the treatment authorized by the state court in this case is irresponsible and insupportable. In simple terms, antipsychotic medication is good for Perry. By "[p]resuming that psychotropic medications are harmful, ignoring their unquestioned therapeutic benefits, and refusing even to acknowledge the unfortunate consequences of a refusal to be treated," Perry's representatives have misled this Court and have closed their eyes to Perry's real medical needs. Brief for the American Psychiatric Association and the Washington State Psychiatric Association as *Amici Curiae*, *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990).

⁹Perry's argument is that *involuntary* medication to achieve competency is unconstitutional, not that execution of treated inmates is unconstitutional. In fact, Perry concedes that the State may constitutionally execute a condemned prisoner whose competence is maintained through medical treatment. Brief for Petitioner at 60.

As this Court has recognized, "the therapeutic benefits of antipsychotic drugs are well documented." *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028, 1041 (1990). Specifically, such drugs have been found to reduce "hallucinations, delusions, disordered thought processes, agitation, withdrawal, and other symptoms of psychotic illnesses." Gutheil and Appelbaum, *supra* note 1, at 100 (footnotes omitted). Because this Court is familiar with the use of psychotropic medication in treating psychotic illnesses, *see Harper*, ___ U.S. at ___, 110 S.Ct. at 1041, the State will not detail here the extensive psychiatric literature documenting the benefits of antipsychotic medication. *See, e.g.*, Kessler & Waletzky, *supra* note 8. It suffices to note that administration of neuroleptic medication to mentally ill patients is not an outlandish, experimental or cruel procedure; rather, as explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[p]sychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses." Brief for the American Psychiatric Association *et al.* at 11, *Harper*, ___ U.S. ___, 110 S.Ct. 1028. *See* Brief for the American Psychiatric Association and the American Medical Association as *Amici Curiae* in Support of Petitioner at 10.

The State recognizes, of course, as did this Court in *Harper*, that antipsychotic medication can produce serious side effects. *Harper*, ___ U.S. at ___, 110 S.Ct. at 1041. The possibility of side effects, however, does not invariably render prescription of antipsychotic medication inappropriate. In almost all cases in which side effects appear, they can be eliminated by reducing the dosage of psychotropic drugs or by prescribing anti-parkinsonian medication. Gutheil and Appelbaum, *supra* note 1, at 109; Kemna, *supra* note 6, at 112. Even tardive dyskinesia, which is considered the most serious side effect of antipsychotics, "is generally mild, not necessarily progressive and very often disappears if antipsychotic medication can be halted. Although severe cases may induce some subjective distress, it is not uncommon . . . for patients to be completely unaware of their movements." Gutheil and Appelbaum, *supra* note 1, at 109 (footnote omitted). Moreover, the potential for side effects is outweighed by the substantial benefits produced by antipsychotic medication; "the overwhelming preponderance of data supports a high benefit/risk ratio for these medications and a safety record

commensurate with other powerful pharmacologic agents." Appelbaum & Gutheil, *Rotting With Their Rights On*, 7 Bull. Am. Acad. Psychiatry & L. 306, 307 (1979) (footnote omitted).

Aside from the advantages of antipsychotic drugs in general, the evidence is clear that, in this particular case, Haldol affects Perry beneficially.¹⁰ Dr. Cox testified that, although Perry is not "completely coherent, well-intergraded [sic], rational" even on medication, he "gets better when he takes medication and he gets worse when he doesn't." (J.A. 84; R. 561). Dr. Cox elaborated:

When he's taking medication he has indicated to me that he feels better, that it helps him rest better and, to me, he seems to function better. When he does not take the medication certainly there's change in his function. To me, there's been a very clear relationship between him being compliant with medicine in the clinical picture that I see when I examine him.

(J.A. 85). Specifically, Dr. Cox explained that, when Perry is medicated, he is less hostile, his thinking is more rational and coherent, and he is in better contact with reality. (R. 568-69). Similarly, Marie Hughes, a prison social worker, has reported that

¹⁰Perry contends that during the post-conviction proceedings "[m]edication was never placed at issue until the trial court decided to force medication." Brief for Petitioner at 30. He complains that the state court did not allow testimony regarding treatment, that he was not given an opportunity to be heard on the treatment issue, and that the state court made no findings as to the possible effects on him of medication. *Id.* at 27, 30. These complaints are wholly without merit. First, all of the experts were questioned and allowed to testify regarding recommended treatment. (R. 554-55, 616; J.A. 70, 88, 94-95). The court limited questioning only as to the experts' *ethical* opinion of treatment of death row inmates to achieve competency. (R. 643-44). Second, at the close of the very first sanity hearing, the court explicitly raised the issue of medication and suggested that the parties brief the issue. (R. 692). Thus, Perry's counsel was well aware of the treatment question and was given ample opportunity to address the issue. Finally, the court specifically found that neuroleptic medication is effective in rendering Perry competent for execution. (J.A. 145). Wisely, the court did not attempt to weigh the costs and benefits to Perry of such medication but rather left the decision as to the desirability of medication to the professional judgment of Perry's physicians. (J.A. 148-49).

medication results in substantial improvement in Perry's condition. (J.A. 101-02). According to Ms. Hughes, when Perry is on medication "he is able to function fairly well in his environment. He is calm, cooperative, verbally spontaneous with appropriate answers to questions . . . Delusional conversation is usually omitted unless specific questions are asked." (J.A. 101). In contrast, when Perry does not take his medication, "he exhibits bizarre behavior, threatens to kill himself and others, states that he is God, and associations are loose. He changes the subject in the middle of a sentence and such delusional matter is spontaneously verbalized." (J.A. 102). Dr. Jimenez and Dr. Kovac have also observed improvement in Perry's condition with medication. (R. 520, 724, 731-32, 761). With the exception of Dr. Estes, who refused to suggest treatment, all of the members of the sanity commission recommended that Perry be treated with neuroleptic medication. (R. 554-55, 616; J.A. 70, 88, 94-95).

Not only is Haldol effective in controlling Perry's psychosis, but Perry has not developed any severe side effects from the medication. In particular, he has not exhibited symptoms of tardive dyskinesia. (R. 552, 574). On the other hand, he has demonstrated some minor side effects, such as drooling and stiffness. (J.A. 72-73). However, Dr. Jimenez testified that Perry exaggerates those symptoms. *Id.* Moreover, such moderate adverse effects on motor functions can be eliminated with medication. (R. 553).

The uncontroverted evidence, then, establishes that treatment with psychotropic medication is in Perry's best medical interest. Indeed, Perry himself has indicated that he would voluntarily take the medication were it not for the instructions of his lawyer to the contrary. (J.A. 104). Nevertheless, Perry ingenuously suggests that the medication ordered by the state court is somehow not "treatment" because it has been judicially authorized for the purpose of maintaining competency for execution.¹¹ Perry asserts that the

¹¹Perry admits that his doctors were, in his own words, "treating" him with psychotropic drugs from 1985 until the state court issued its order authorizing nonconsensual medication. Brief for Petitioner at 27-28. Thus, Perry does not claim that administration of antipsychotic medication is inherently non-treatment. Rather, he suggests that appropriate psychiatric treatment with neuroleptic drugs was mysteriously transformed into non-treatment by the judicial order authorizing its involuntary administration.

state court's medication order considers only the State's interest in achieving competency and ignores his medical needs; as a result, he contends that medication pursuant to the court's order is not treatment.¹² Contrary to Perry's characterization of the medication order, however, the court's authorization of medication takes into account *both* Perry's medical needs and the State's interest in assuring Perry's competency for execution. Because the court's order authorizes medication only when prescribed by the prison's medical staff (J.A. 148-49), the order "ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1037. As in *Harper*, this Court should "not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary." ¹³ *Id.* at 1037 n.8.

¹²It is ironic that Perry's counsel demands that decisions regarding medical treatment should be made by Perry's physicians in the exercise of their professional judgment without regard to non-medical considerations. As explained in the text, that is exactly what the state court order authorizes. Moreover, Nordyke's actions during his reign as Perry's decision-maker betray his expressions of concern for Perry's medical welfare. While Nordyke now proclaims that Perry's treating doctors were responsive to his medical needs, Brief for Petitioner at 27-28, during the post-conviction competency hearings, he *twice* ordered prison authorities to remove Perry from all medication without regard to the professional judgment of Perry's physicians. (R. 184, 204). Indeed, the medication issue is now before this Court only because Nordyke has instructed Perry to ignore the recommendations of his doctors. Thus, Nordyke's professed faith in the professional judgment of Perry's doctors and his concern that Perry be "treated" are, to say the least, suspect.

¹³Perry and *amici curiae* the American Psychiatric Association and the American Medical Association posit that treatment of condemned inmates to produce competency for execution is itself contrary to standards of medical ethics. The *amici curiae* go so far as to argue that even the State has a "vital" interest in avoiding violation of that supposed ethical norm. Brief for the American Psychiatric Association *et al.* at 16. However, the ethical stance assumed by Perry and the *amici curiae* is not universally accepted in the medical profession. Many psychiatrists take the position that it is unethical *not* to treat a mentally ill death row inmate, even if the ultimate result is competency to be executed. Miller, *Evaluation of and Treatment to*

Considering the benefits to Perry of antipsychotic medication, it is ludicrous for Perry to suggest that such treatment is "cruel and unusual punishment" forbidden by the Eighth Amendment. Common sense dictates that the State does not violate the Eighth Amendment by doing something good for a prisoner. As explained by Justice Brennan, the fundamental principle underlying the Eighth Amendment is that criminal penalties must comport with the basic concept of human dignity:

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.

Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). *Accord Gregg v. Georgia*, 428 U.S. 153, 173, 182 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Trop*, 356 U.S. at 100. While "the Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century," *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.), this Court has never extended the Eighth Amendment's proscription to *beneficial* treatment of prisoners. Medical treatment which benefits a mentally ill inmate is simply not

Competency to be Executed: A National Survey and an Analysis, 16 J. Psychiatry & L. 67 (1988); Ward, *supra* p. 16. That position recognizes the distinction between the *medical* decision to treat and the *legal* decision to impose the death penalty. Thus, many psychiatrists and the National Medical Association "endors[e] the principle that physicians are ethically obligated to relieve suffering without consideration of subsequent non-medical consequences." Miller, *supra*, at 77.

To be sure, the ethical question posed by the decision to treat a condemned prisoner is not an easy one. But that question need not be resolved here. The constitutional issues before this Court are entirely separate from the ethical issues; it is manifest that the Constitution does not embrace any particular view of medical ethics. The ethical choice of whether or not to treat a death row inmate must be left to physicians on a case-by-case basis. If Perry's physicians continue to prescribe antipsychotic medication, as they have in the past, it is not for *amici curiae* or this Court to attempt to erect ethical barriers to such treatment.

contrary to the "dignity of man" or outside "the limits of civilized standards." *Trop*, 356 U.S. at 100. Thus, unless the Eighth Amendment is turned on its head, it cannot be construed as prohibiting appropriate and beneficial psychiatric treatment.

Despite the recognized benefits to Perry of neuroleptic medication, Perry seems to argue that nonconsensual administration of such medication constitutes cruel and unusual punishment because the State's purpose is to induce competency for execution. That argument is without merit. Medication of Perry is, of course, intended to render him competent for execution. In fact, *every* aspect of Perry's confinement contemplates, and is intended to facilitate, Perry's eventual execution. Perry's confinement itself is a precursor to execution of the death penalty. Yet his mere imprisonment is certainly not cruel and unusual punishment. Because capital punishment is an acceptable penalty under the Eighth Amendment, the State must be allowed to employ the means necessary to carry out the death penalty unless those means are themselves cruel and unusual. In short, treatment of a prisoner which is not otherwise violative of the Eighth Amendment does not become cruel and unusual punishment merely because it facilitates execution.

In this case, involuntary treatment is not only permitted by the Eighth Amendment, but it is mandated by the Amendment. This Court held in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment. Hence, the Eighth Amendment creates a State duty to provide prisoners with medical treatment. In compliance with that duty, the State has been treating Perry with psychotropic drugs since his conviction. Now, at the instructions of his lawyers, Perry refuses to accept prescribed medication. Nevertheless, the State cannot ignore its duty to care for Perry's medical needs. Because Perry loses touch with reality when he goes without his medication, he cannot be considered competent to make his own treatment decisions. Indeed, Perry's counsel conceded as much when he moved for appointment as Perry's decision-maker: "the decision making processes of the defendant are so impaired as to render them completely unreliable." (R. 187). Thus, notwithstanding Perry's refusal of medication, the State, as Perry's custodian, must ensure that he receives proper psychiatric treatment.

To honor Perry's objections and allow him to languish in a continual state of psychosis, tortured by hallucinations, delusions and paranoid fantasies, would unquestionably constitute cruel and unusual punishment. See Brief for the American Psychiatric Association *et al.* at 20.

B. There is no national consensus against involuntary medication of capital offenders to achieve competency for execution.

Even assuming for the sake of argument that beneficial medical treatment could constitute cruel and unusual punishment under some circumstances, the Eighth Amendment does not forbid prescribed medication of death row inmates which produces competency for execution. Perry insists that there is a national consensus opposing such medication. However, medication which induces competency for execution is entirely consistent with contemporary American standards regarding treatment of mentally ill prisoners.

This Court has held that the Eighth Amendment ban on cruel and unusual punishment is not limited to those penalties forbidden at the time the Bill of Rights was adopted.¹⁴ *Ford*, 477 U.S. at 406; *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.). Rather, the Eighth Amendment proscription extends to punishments which are contrary to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, where there is a national consensus against a particular punishment, this Court will find imposition of that punishment to be cruel and unusual in violation of the Eighth Amendment. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989); *Penry*, ___ U.S. ___, 109 S.Ct. 2934. In determining whether a national consensus exists, this Court looks to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell and Stevens, JJ.). In particular, the Court considers legislation

¹⁴Perry does not argue that involuntary medication to restore sanity for execution was prohibited at common law. Nor could he. Antipsychotic drugs were not available as a treatment for mental illness until this century. Kessler & Waletzky, *supra*, note 8, at 202; Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. Forensic Sci. 568, 570-71 (1972).

to be "the primary and most reliable indication of consensus." *Stanford*, ___ U.S. at ___, 109 S.Ct. at 2977.

A review of state legislation reveals no "objective evidence . . . of an emerging national consensus," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2955, against medication of death row inmates to produce competency for execution. No jurisdiction explicitly prohibits such medication. On the other hand, contrary to Perry's allegation that "[n]o state has passed legislation authorizing the use of medication to establish competency for execution," Brief for Petitioner at 40 (emphasis omitted), Maryland expressly allows medication of condemned prisoners to restore competency. See Appendix E. Moreover, of the 37 states which have enacted capital punishment, 24 (including Maryland) contemplate the use of medication to produce competency by specifically authorizing treatment of incompetent death row inmates or by providing that the execution of such inmates will be stayed or suspended *until competency is regained*.¹⁵ See Appendix F. The statutes of the remaining 13 death penalty states, including Louisiana, are silent on the issue of restoration of competency. However, these 13 states, as well as the 13 states and the District of Columbia which do not allow capital punishment, authorize involuntary treatment of prisoners and criminal defendants in other contexts.¹⁶ See Appendixes H and I. Thus, involuntary medication of prisoners is not, in and of itself, contrary to contemporary values.¹⁷ Moreover, at least twenty states statutorily provide that competency to stand trial may be achieved with medication. See Appendix J.

¹⁵In addition, three other states had similar provisions before outlawing capital punishment. See Appendix G.

¹⁶As evidence of a national consensus against involuntary medication of prisoners, Perry points this Court to a host of state statutes regarding the rights of civilly committed patients. Appendix to Brief for Petitioner, Chart 2. However, because prisoners do not necessarily possess the same rights enjoyed by those who have not been convicted of crimes, statutes governing treatment of civilly-committed patients are for the most part irrelevant to the issue of contemporary standards regarding treatment of prisoners.

¹⁷Indeed, 20 states authorize capital punishment by lethal injection. U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment* 1988, 5, Table 2 (1989).

Recently, in *Stanford v. Kentucky*, ___ U.S. ___, ___, 109 S.Ct. 2969, 2975-76 (1989), this Court held that a showing that 15 states forbid the execution of 16-year-old offenders and that 12 states forbid the execution of 17-year-old offenders did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Thus, in claiming that involuntary medication of prisoners to achieve competency for execution is prohibited by the Eighth Amendment, it is Perry's "heavy burden" . . . to establish a national consensus *against* it." *Id.* at ___, 109 S.Ct. at 2977 (citation omitted). As the above survey of state legislation demonstrates, Perry has failed to carry that burden. Not a single state has enacted legislation forbidding medication of prisoners to restore competency for execution. Moreover, such medication is *authorized* by the only state which has specifically addressed the issue by statute. Hence, "the clearest and most reliable objective evidence of contemporary values," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2953, reveals absolutely no opposition to the use of medication to achieve competency for execution, much less a national consensus against such treatment. In short, medication of condemned prisoners to produce competency is not contrary to "evolving standards of decency."¹⁸

C. Nonconsensual treatment of death row inmates which produces competency for execution does not violate the Eighth Amendment prohibition of excessive punishment.

¹⁸Perry places great emphasis on the fact that the state court's order is not specifically authorized by state statute or by a decision of the state Supreme Court but rather is, as he phrases it, "the product of penological policy-making by a single trial judge." Brief for Petitioner at 37. That is beside the point. A particular punishment need not be explicitly sanctioned by statute or supreme court decision in order to be permissible under the Eighth Amendment. For example, in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989), a mentally retarded murderer was sentenced to death; the sentence was not based on an explicit state authorization of capital punishment of mentally retarded murderers. Yet this Court refused to hold that execution of mentally retarded offenders violates the Eighth Amendment. Likewise, in this case, Louisiana's failure to expressly authorize the treatment at issue does not render that treatment violative of the Eighth Amendment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell and Stevens wrote that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive [of the Eighth Amendment issue]. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.'" *Id.* at 173 (joint opinion of Stewart, Powell and Stevens, JJ.) (citation omitted). "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). See also *Stanford*, ___ U.S. ___, 109 S.Ct. 2969 (O'Connor, J., concurring in part and concurring in the judgment); *id.* (Brennan, J., dissenting); *Penry*, ___ U.S. ___, 109 S.Ct. 2934 (opinion of O'Connor, J.); *id.* (Brennan, J., concurring in part and dissenting in part). As explained below, medication of incompetent death row inmates is not only consistent with this nation's "evolving standards of decency," but it survives the excessiveness inquiry suggested by *Gregg*.¹⁹

There are two generally accepted purposes of the death penalty: retribution and deterrence. *Enmund v. Florida*, 458 U.S. 782 (1982). "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 183-84 (joint opinion of Stewart, Powell and Stevens, JJ.) (footnotes omitted). In addition, the death penalty can be in some cases an effective deterrent to potential capital offenders: "[t]here are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." *Id.* at 186 (footnotes omitted).

¹⁹Perry does not expressly claim that involuntary medication to achieve competency for execution violates the Eighth Amendment proscription of excessive punishment. Nevertheless, because the basis for Perry's Eighth Amendment claim is not entirely clear, we address the excessiveness issue.

Medication of death row inmates which produces competency for execution significantly contributes to both goals of the death penalty. It is readily apparent that, if a condemned prisoner is shielded from execution by virtue of incompetency, the State cannot give effect to society's moral outrage at the prisoner's crime. Medication which restores competency and thereby allows execution of the death penalty thus satisfies the retributive goal of capital punishment. In addition, medication which induces competency enhances the deterrent effect of the death penalty by increasing the likelihood of execution. As loopholes to execution are narrowed or closed, the death penalty becomes a more certain punishment and hence a better deterrent. Thus, by limiting the effectiveness of mental illness as an escape hatch from execution, medication of incompetent death row inmates contributes to the penological goal of deterrence.

The second prong of the Eighth Amendment excessiveness inquiry requires evaluation of the proportionality of the punishment in relation to the seriousness of the offense. See *Solem v. Helm*, 463 U.S. 277 (1983). As Justices Stewart, Powell and Stevens explained in *Gregg*, "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell and Stevens, JJ.). Yet capital punishment is not invariably disproportionate punishment for the crime of deliberate murder. *Id.* Assuming for the sake of argument that involuntary medication to achieve competency for execution increases the severity of a capital offender's punishment, such medication certainly does not constitute punishment that is so severe as to be disproportionate to the crime of premeditated murder, "the most extreme of crimes." *Id.* Murders which are "so grievous an affront to humanity," *id.* at 184, as to justify the ultimate penalty of death must likewise merit the relatively minor intrusion of nonconsensual medication.

In this case in particular, the "penalty" of involuntary medication is amply justified by Perry's cold-blooded murders of five members of his family. As described by the Louisiana Supreme Court, Perry's crimes were particularly egregious:

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his

parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge [sic] in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

(J.A. 40-41). Obviously involuntary medication is not overly severe treatment for the criminal responsible for these crimes. The brutal slayings of five people, including a two-year-old child, merit the death penalty, even if carrying out that penalty requires treating Perry with medication to achieve his competency.

III. Perry has no Fourteenth Amendment right to refuse prescribed medication which will render him competent to be executed.

In addition to his Eighth Amendment argument, Perry contends that he is protected from unwanted medication by the Fourteenth Amendment. According to Perry, both the Due Process Clause and Louisiana law grant state prisoners a liberty interest in refusing antipsychotic medication. However, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to carry out the death penalty; thus, a death row inmate who requires medication to be competent for execution is not entitled by the Fourteenth Amendment to refuse such medication. Moreover, Louisiana law does not create a constitutionally protected liberty interest in avoiding medication which is intended to produce competency for execution. Finally, even assuming that Perry has a liberty interest in refusing medication, that interest is overridden by the State's interest in effectuating the death penalty.

A. The imposition of a sentence of death extinguishes the right created by the Due Process Clause to refuse prescribed antipsychotic medication.

This Court has consistently recognized that prisoners do not retain the full range of liberty interests enjoyed by others. It is self-evident that a conviction and sentence of imprisonment necessarily extinguish the right to be free from confinement. Likewise, a

conviction and sentence of imprisonment justify restrictions on an inmate's freedom which are "ordinarily contemplated by a prison sentence." *Hewitt*, 459 U.S. at 468. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, this Court has held that prisoners do not enjoy constitutionally created rights to be free from administrative segregation, *Hewitt*, 459 U.S. 460, restrictions on visitation, *Thompson*, ___ U.S. ___, 109 S.Ct. 1904, interstate transfer from one prison to another, *Meachum v. Fano*, 427 U.S. 215 (1976), or transfer to an out-of-state prison, *Olim v. Wakinekona*, 461 U.S. 238 (1983). "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye*, 427 U.S. at 242. See also *Vitek v. Jones*, 445 U.S. 480 (1980).

In *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990), this Court held that a Washington State prisoner had a liberty interest under the Due Process Clause of the Fourteenth Amendment in refusing medication with psychotropic drugs. The Court explicitly recognized, however, that "[t]he extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at ___, 110 S.Ct. at 1037.

In this case, Perry's interest in refusing antipsychotic medication must be viewed in light of his sentence of death. Just as a sentence of imprisonment justifies conditions of confinement which are "within the sentence imposed," *Montanye*, 427 U.S. at 242, so does a sentence of death justify restrictions on liberty which are required to effectuate the death penalty. A sentence of death contemplates that the liberty interests of the condemned inmate will be restricted to the extent necessary to carry out that sentence. For example, a sentence of death by electrocution requires that the condemned prisoner be physically strapped to the electric chair; as a result, the constitutional liberty interest in freedom from bodily restraint, see *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), is superseded by imposition of the death penalty.

The State cannot carry out Perry's sentence of death unless his competence to be executed is maintained with the use of antipsychotic drugs. Treatment of Perry with such medication is thus a necessary precondition to execution of Perry's sentence and is therefore "within the sentence imposed upon him." *Montanye*, 427 U.S. at 242. In short, the *Harper* right to be free from involuntary medication was extinguished by Perry's sentence of death.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding medication intended to achieve competency for execution.

As previously noted, the decisions of this Court establish that "where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford*, 477 U.S. at 428 (O'Connor, J., concurring in the result in part and dissenting in part), *quoting Hewitt v. Helms*, 459 U.S. at 471-72. Perry maintains that Louisiana law creates a constitutionally protected right to refuse psychiatric treatment intended to achieve competency for execution. Specifically, Perry asserts that La. C.Cr.P. art. 648, La. R.S. 15:830.1, and La. R.S. 28:171(P) grant him a constitutionally protected liberty interest in avoiding the medication authorized by the state court. However, none of those statutes creates such a liberty interest.

La. C.Cr.P. art. 648, which is reproduced in Appendix B, provides that, when a criminal defendant is judicially determined to be incapable of standing trial, he shall be committed "to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues." La. C.Cr.P. art. 648A. The statute further provides that if, after commitment, the court finds that the defendant is not likely to become capable of standing trial, the defendant shall be released on probation or, if he is a danger to himself or others, civilly committed for treatment. La. C.Cr.P. art. 648B. Although Article 648 is addressed to determinations of capacity to proceed to trial, Perry submits that the Code articles governing claims of incompetency to stand trial, including Article 648, have been applied by the Louisiana Supreme Court in the post-conviction context. However, as explained *supra* at pages 18-19, only the

procedural requirements of La. C.Cr.P. arts. 641 *et seq.* have been extended to the post-conviction setting. Thus, any *substantive* right created by Article 648 is not available to Perry. More importantly, though, Article 648 plainly does not recognize a right to refuse treatment. In fact, the Article explicitly *requires* treatment to achieve competency. So, assuming for the sake of argument that Article 648 is fully applicable to post-conviction competency proceedings, it specifically authorizes the treatment ordered in this case.

La. R.S. 28:171(P) is likewise inapplicable here. Section 171, which is reproduced in Appendix C, is a declaration of the rights of patients in state treatment facilities for the mentally ill; it simply does not apply to treatment of prisoners on death row.²⁰ Assuming *arguendo* that the statute applies, it does not create a right to refuse the medication at issue in this case. La. R.S. 28:171(P) provides that "[n]o medication may be administered to a patient except upon the order of a physician. . . . Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff." Perry claims that this provision prohibits any medication which is not for "treatment." However, as explained *supra* at pages 29-30, the medication authorized by the state court is to "treat" Perry. So, if Section 171(P) establishes treatment as a "substantive predicate" absent which medication will not be ordered, that substantive predicate has been met.²¹

²⁰La. R.S. 28:2(28)(C) specifically excludes prisons and jails from the definition of "treatment facility." See Appendix C. Moreover, a reading of Section 171 in its entirety makes it crystal clear that it was not intended to apply to state prisoners. The Section grants patients the rights to "unimpeded, private and uncensored communication . . . by mail, telephone and visitation," La. R.S. 28:171(C), to "be employed at a useful occupation," La. R.S. 28:171(H), and to "wear [their] own clothes," La. R.S. 28:171(G). Certainly, the legislature did not intend to grant those rights to death row inmates.

²¹The mere fact that Perry's treatment also produces competency for execution is of no consequence. Section 171(P) cannot be read as prohibiting medically necessary treatment merely because the treatment also serves another purpose. Indeed, as discussed above, La. C.Cr.P. art. 648 explicitly requires treatment to produce competency to stand trial. Thus, Louisiana law does not categorically forbid the use of medically appropriate treatment to produce competency.

Unlike Article 648 and Section 171, La. R.S. 15:830.1, reproduced in Appendix D, does apply in the prison setting. That statute provides for involuntary treatment of a mentally ill prisoner for up to fifteen days when a prison physician or psychiatrist "certifies that the treatment is necessary to prevent harm or injury to the inmate or to others." La. R.S. 15:830.1A. Section 830.1 further provides that, when treatment for more than fifteen days "is deemed necessary," judicial proceedings shall be initiated to determine whether the inmate should be committed to a treatment facility for continued treatment. *Id.* The proceedings must "be in accord with all procedures required by law in the case of judicial commitment." La. R.S. 15:830.1C. Treatment of the prisoner must continue during pendency of the proceedings. La. R.S. 15:830.1A. Following a judicial hearing at which the prisoner is represented by counsel, "the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided." *Id.*

Section 830.1 does not create a constitutionally protected liberty interest because it does not contain "explicitly mandatory language" that nonconsensual medication "will not occur absent specified substantive predicates." *Hewitt*, 459 U.S. at 472. Section 830.1 provides that involuntary medication of a prisoner "will be permitted" if such treatment "is necessary to prevent harm or injury to the inmate or to others," La. R.S. 15:830.1A, but it does not *mandate* treatment under those circumstances. Thus, the statute "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Thompson*, ___ U.S. at ___, 109 S.Ct. at 1910 (footnote omitted). Moreover, Section 830.1 does not specify that involuntary medication is permitted *only* if necessary to prevent harm or injury. A finding that medication is necessary to prevent harm or injury is a *sufficient* condition for nonconsensual administration of neuroleptic medication, but it is not a *necessary* condition for that treatment. Perry cannot therefore "reasonably form an objective expectation" that he will not be medicated absent a finding that he poses a risk of harm or injury to himself or others. *Id.* at ___, 109 S.Ct. at 1911. In other words, even if Section 830.1 creates an expectation that an inmate *will* be medicated if necessary to prevent harm or injury, the statute does not create "a justifiable expectation on the part of the inmate that the drugs will *not*

be administered unless [that condition] exist[s]." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1036 (emphasis added).²²

C. Even assuming that a death row inmate retains a liberty interest in being free from involuntary medication, such interest is outweighed by the State's interest in enforcing a validly imposed sentence of death.

In *Turner v. Safley*, ___ U.S. ___, ___, 107 S.Ct. 2254, 2261 (1987), this Court held that a prison regulation which interferes with prisoners' constitutional rights is valid as long as "it is reasonably related to legitimate penological interests." Although the *Turner* standard of review is stated in terms of prison "regulations," this Court has noted that the standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1038. Thus, even assuming that Perry retains a right to refuse medication under either the Due Process Clause or Louisiana law, the court order

²²Perry contends that Section 830.1 creates a constitutionally protected entitlement because it is "written in mandatory language." Brief for Petitioner at 42. Specifically, Perry points out the following language in Section 830.1: "If treatment for a longer period is deemed necessary, a *petition shall be filed* in a court of competent jurisdiction setting forth the reasons for the treatment. . . . After a hearing . . . , *the court shall determine* whether the inmate is competent and, if not, *he shall order* that appropriate treatment be provided." La. R.S. 15:830.1A (emphasis added). However, this language is not relevant to the issue of whether Section 830.1 creates a liberty interest in refusing medication. As explained by this Court in *Kentucky Department of Corrections v. Thompson*, ___ U.S. ___, ___ n.4, 109 S.Ct. 1904, 1910 n.4 (1989), "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [sic] an inmate may be deprived of the particular interest in question." The language relied on by Perry does not *require* that medication be ordered if an inmate poses a danger to himself or others; the quoted language comes into play only *after* an initial decision has been made to medicate the inmate for fifteen days. In addition, the quoted language does not prohibit medication under other circumstances. Thus, the language is "irrelevant mandatory language." *Id.* at ___ n.4, 109 S.Ct. at 1910-11 n.4.

authorizing nonconsensual medication to achieve Perry's competency to be executed is valid because it is reasonably related to the State's interest in carrying out the death penalty.

In *Harper*, this Court considered a constitutional challenge to a Washington prison regulation which provided for forcible treatment of mentally ill prisoners with prescribed antipsychotic drugs if the prisoners were found likely to harm themselves or others. While recognizing a constitutional liberty interest in refusing unwanted medication, the Court applied the *Turner* standard of review and upheld the regulation as reasonably related to legitimate penological interests. *Id.* In so holding, the Court considered three factors which the *Turner* decision identified as relevant to the determination of the reasonableness of a regulation:

'First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.' 482 U.S., at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, a court must consider 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.' 482 U.S., at 90. Third, 'the absence of ready alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials 'have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' *Id.*, at 90-91; see also *Estate of Shabazz*, *supra*, at 350.

Id.

Consideration of the three *Turner* factors supports a conclusion that nonconsensual medication of a death row inmate to achieve competency for execution is constitutionally permissible. First, it is manifest that the State has a substantial interest in enforcing criminal sentences. See Brief for Petitioner at 44. The fundamental purposes of punishment, retribution and deterrence, cannot be served if criminal sentences are not carried out. In addition, as in *Harper*, the State has an interest in providing prisoners with treatment which is in their best medical interest. *Harper*, ___ U.S. at ___, 110 S.Ct. at 1039. The provision of medically prescribed treatment to a mentally ill prisoner to achieve his competency to be executed serves both of these State

interests. The medication makes it possible for the State to enforce a validly imposed death sentence. Moreover, "the fact that the medication must first be prescribed by a psychiatrist . . . ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Id.* at ___, 110 S.Ct. at 1037 (footnote omitted).

Second, under the circumstances, accommodation of the right to refuse medication would impose a significant burden on the prison system. Supervision and care of untreated mentally ill prisoners is considerably more difficult than supervision and care of mentally ill prisoners who are properly treated. As explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[m]aintaining a significant number of unmedicated patients may impose considerable burdens on the staff in caring for the refusing prisoner and others whose treatment programs break down. These burdens, in turn, carry unfortunate consequences for recruiting and keeping staff of a consistently high quality." Brief for the American Psychiatric Association *et al.* at 21 n.17, *Harper*, ___ U.S. ___, 110 S.Ct. 1028. In addition, prohibition of involuntary medication would make claims of incompetency more inviting by granting incompetent prisoners an absolute reprieve from execution; such an approach would likely encourage death row inmates to feign incompetency. See *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

Third, when an incompetent death row inmate refuses treatment, there is *no* alternative to medication which will serve the State's interest in carrying out the inmate's sentence. The right to refuse medication is thus tantamount to the power to circumvent the death penalty. In this case, the evidence is undisputed that Perry will not remain competent for execution unless he is maintained on Haldol. Consequently, without the right to treat Perry, the State cannot enforce his sentence of death.

In sum, nonconsensual medication of Perry is reasonably related to the State's legitimate penological interest in enforcing the death penalty. Such medication is also reasonably related to the State's interest in providing Perry with treatment which is in his medical interest. As a result, the medication is permissible under the Fourteenth Amendment.

IV. The state court's conduct of adversarial hearings on the issue of competency, accompanied by the full panoply of attendant procedural protections, exceeded the requirements of the Due Process Clause of the Fourteenth Amendment.

Assuming *arguendo* that he has a protected interest in refusing medication, Perry has two liberty interests which were at stake in the post-conviction proceedings: the Eighth Amendment right to avoid execution during incompetency and the right to refuse medication. Both rights hinge on the determination of competency; if Perry is competent, he may be executed, and, if Perry is incompetent, he may be treated against his will with antipsychotic medication to achieve competency. The Due Process Clause thus requires that Perry be afforded procedures adequate to ensure that the competency determination is neither arbitrary nor erroneous.

This Court's decisions in *Ford* and *Harper* are instructive as to the procedures due Perry under the Fourteenth Amendment. In *Ford*, this Court held that the Florida procedure for determining competency for execution did not provide for a full and fair hearing under 28 U.S.C. §2254. Justice Marshall's plurality opinion identified three defects in the Florida scheme: "failure to include the prisoner in the truth-seeking process," 477 U.S. at 413, "denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," *id.* at 415, and "placement of the decision wholly within the executive branch," *id.* at 416. While Justice Marshall indicated that "a full trial on the issue of sanity" is not necessary, he stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible" and that "the manner of selecting and using the experts responsible for producing that 'evidence' [should] be conducive to the formation of neutral, sound, and professional judgments." *Id.* at 416-417. In a concurring opinion, Justice Powell noted that the issue of whether the state fact-finding procedure amounted to a full and fair hearing under 28 U.S.C. §2254 was identical to the procedural due process issue. *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Although Justice Powell did not determine "the precise limits that due process imposes in this area," he stated that "the requirements of due process are not as elaborate as Justice Marshall suggests." *Id.* at 425, 427. He

concluded that, in general, only an impartial decisionmaker and an opportunity to be heard are constitutionally required. *Id.* at 427. Justice O'Connor, concurring in the result in part and dissenting in part, reasoned that "the Due Process Clause imposes few requirements on the States in this context." *Id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). She nevertheless found the Florida procedure invalid because it failed to provide the prisoner with an opportunity to be heard. *Id.* at 430.

In the *Harper* case, as noted above, this Court considered a due process challenge to a Washington prison regulation providing for forcible medication of mentally ill prisoners who pose a danger to themselves or others. The challenged policy allowed nonconsensual medication of an inmate only after an adversary hearing before a special committee composed of a psychologist, a psychiatrist and the associate superintendent of the treatment facility. ____ U.S. at ____, 110 S.Ct. at 1033. The policy afforded the prisoner the rights to notice, attendance at the hearing, presentation of evidence, cross-examination of witnesses, assistance of a lay advisor and judicial review. *Id.* at ____, 110 S.Ct. at 1033-34. This Court upheld the policy's procedures as adequate under the Fourteenth Amendment. *Id.* at ____, 110 S.Ct. at 1040. Specifically, the Court rejected claims that due process requires a judicial decisionmaker, right to counsel, application of the rules of evidence, or proof by "clear, cogent and convincing" evidence. *Id.* at ____, 110 S.Ct. at 1042, 1044.

The procedures used by the state court in determining Perry's competency far exceeded the requirements of the *Harper* and *Ford* decisions. The competency determination was made by a judicial decisionmaker after adversary hearings and was subjected to appellate review. Perry was allowed to recommend appointments to the sanity commission, and his recommendations were honored. (R. 19; J.A. 46). Throughout the proceedings, Perry was represented by counsel. (J.A. 45-51). He was afforded the rights to be present at the hearings (J.A. 47, 50), to testify in his behalf (J.A. 95-97), to cross-examine witnesses (*see, e.g.*, R. 722), to compel production of documents (J.A. 46), to videotape the proceedings (J.A. 47), to present evidence (J.A. 125; R. 539-40, 542-45), and to submit written memoranda and oral argument (*see, e.g.*, R. 691, 763, 766). In short, the state court conducted a full-scale competency trial; it is

inconceivable that due process requires more.

Perry nevertheless asserts that the competency proceedings were constitutionally deficient in two respects. First, he complains that the court admitted into evidence the documents submitted by the Department of Public Safety and Corrections. (J.A. 99-106). According to Perry, because the documents were submitted *ex parte* and contain hearsay, their consideration by the court amounts to a denial of due process. Second, Perry insists that his due process rights were violated because the trial court failed to comply with procedures required by Louisiana law. Both of these complaints are meritless.

In *Harper*, this Court rejected an argument that a pre-hearing meeting between the special committee and the treatment facility staff, conducted without the inmate's presence, violated due process. The Court explained that "[a]bsent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing [the inmate] to contest the [state's] position at the hearing satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Harper*, ___ U.S. at ___, 110 S.Ct. at 1044 (citation omitted). Similarly, in this case, Perry cannot show that he was prejudiced by the *ex parte* submission of the challenged documents. The documents were submitted to the court in early June of 1988. (J.A. 99). By the end of that month, at the latest, Perry's counsel was aware of the Department's submission of the documents. (R. 194-97). In August of 1988, the court ordered the documents admitted into evidence. (J.A. 48). Subsequently, the court conducted two evidentiary hearings at which Perry had the opportunity to contest the evidence. Indeed, at the conclusion of the October hearing, the Court specifically offered Perry's counsel the opportunity to present evidence. (J.A. 125). Under the circumstances, Perry cannot claim that he was prejudiced, or even inconvenienced, by the short delay in notifying him of the documents' submission. Perry simply cannot now complain because he neglected to refute record evidence of which he was aware for several months.

Perry's objection to the hearsay nature of the evidence is likewise unfounded. Perry points to no authority for the proposition that the hearsay prohibition is constitutionally required in competency proceedings. Neither *Ford* nor *Harper* suggests such a

requirement. In *Harper*, this Court explicitly rejected the argument that application of the rules of evidence was constitutionally required. ___ U.S. at ___, 110 S.Ct. at 1044. In addition, the plurality opinion in *Ford* stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible." 477 U.S. at 417. Certainly, Perry cannot claim that the documents in question were not relevant. Moreover, given the medical nature of the competency determination, the inmate's interests are better protected by considering "the realities of frequent and ongoing clinical observation by medical professionals," *Harper*, ___ U.S. at ___, 110 S.Ct. at 1042, than by formal adherence to the rules of evidence. In fact, Perry himself offered six volumes of hearsay medical records at the first hearing. (R. 539-40). Finally, because Perry was given an unfettered opportunity to contest the evidence, he cannot assert that he was prejudiced by its admission.

Perry's second complaint is that the state court failed to comply with procedures required by Louisiana law. However, Perry does not identify any specific deficiencies in the state court procedure. Moreover, a state's failure to follow its own procedures is not a violation of due process; "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12. This Court rejected an identical argument in *Olim v. Wakinekona*, 461 U.S. 238 (1983):

Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Id. at 250-51 (footnote and citations omitted). See also *Hewitt*, 459 U.S. 460. Thus, the State's compliance or noncompliance with its own procedural requirements is irrelevant to the constitutional issues before this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIXES

APPENDIXES

APPENDIX A	Excerpts From Record
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APPENDIX A**EXCERPTS FROM RECORD****LETTER TO JUDGE HYMEL FROM****KEITH B. NORDYKE****[RECORD—P. 19]****Nordyke and Denlinger***Attorneys at Law*

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January 20, 1988

The Honorable L. J. Hymel, Judge

19th Judicial District Court

Parish of East Baton Rouge

222 St. Louis Street

Baton Rouge, LA 70801

Re: *State of Louisiana v. Michael Owen Perry*

Dear Judge Hymel:

You have asked the defense to submit names of persons who the defense would like to nominate to the sanity commission in the above captioned. To that end, the defense would nominate as a psychiatrist qualified to serve on the sanity commission Dr. Glen Estes, Suite 3, 4521 Jamestown Avenue, Baton Rouge, Louisiana, telephone (504) 927-3062.

As I stated in open court, Dr. Curtis Vincent, a psychologist practicing in Baton Rouge, did extensive workups on Mr. Perry while Michael was at Feliciana Forensic Facility. As the 1987 legislature amended the Code of Criminal Procedure to allow psychologists to sit on sanity commissions I think it would be appropriate for Dr. Curtis Vincent to be appointed especially in light of his familiarity with this case. I therefore nominate as the psychologist member of this panel

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Dr. Curtis Vincent, 5000 Constitution Avenue, Baton Rouge, Louisiana, telephone (504) 928-6460.

Please advise if there is anything further that we can do to assist the court in this regard.

Very truly yours,

NORDYKE AND DENLINGER

/s/ Keith B. Nordyke

KEITH B. NORDYKE

* * *

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**EXCERPT FROM MEMORANDUM IN SUPPORT OF
STATE'S MOTION TO DISQUALIFY
KEITH NORDYKE AS COUNSEL OF RECORD IN
THESE PROCEEDINGS AND AS "DO-GOODER" FOR
MICHAEL OWEN PERRY**

[RECORD—P. 91]

* * *

The State * * * did not receive from defense counsel, a copy of Mr. Nordyke's March 14, 1988 letter (attached as App. F) to the Warden of the Louisiana State Penitentiary. Mr. Nordyke's letter instructed the warden to discontinue, the administering of any and all psychotropic medication to Michael Owen Perry: including but not limited to the medication ordered by medical doctors under whose care Michael Perry was placed.

* * *

[RECORD—P. 184]
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March 14, 1988

Warden
 Angola State Penitentiary
 Angola, LA 70775

Re: Michael Owen Perry
 (Death Row)

Dear Warden:

* * *

Pursuant to that decision making authority that has been delegated to me, I hereby request that Michael Owen Perry be removed from any and all psychotropic medication including but not limited to Haldol and Prolixin, which may currently be administered to Mr. Perry. This medication shall not be given to Mr. Perry until such time as I specifically concur or of course, a court orders otherwise. Mr. Perry is totally incompetent and unable to make decisions on his own behalf. He is currently undergoing evaluation by numerous doctors. I deem it in Mr. Perry's best interests not to be taking medication at this point in time. I have carboned a copy of this letter to the hospital at Angola and request that same be placed clearly in Mr. Perry's chart.

* * *

[RECORD—P. 186]

* * *

EX PARTE MOTION FOR DELEGATION OF DECISION MAKING AUTHORITY

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry, an incompetent death row inmate, who respectfully suggests to the Court through his undersigned counsel the following:

1.

Undersigned counsel visited with Perry on January 6, 1988, at the hospital at Louisiana State Penitentiary. Michael was blatantly psychotic, unable to articulate any facts regarding his case cogently and was completely incapable of making decisions on his own behalf.

2.

It is anticipated during the course of the representation of Mr. Perry for purposes of the "Perry Motion" that there will be certain issues raised, such as the ability to waive the attorney client privilege, whether to abandon defenses or not, and whether or not Perry himself should be an exhibit or attempt to testify. Counsel believes Perry to be totally incapable of making these decisions for himself.

3.

On January 15, 1988, undersigned counsel contacted Mr. Tom Collins, executive counsel of the Louisiana State Bar Association, in an attempt to obtain ethical guidance and in particular, interpretation of Rule 1.14 of the Louisiana Code of Professional Responsibility. Rule 1.14 (copy attached) asserts that the attorney must "take other protective action as may appear appropriate under the circumstances" [when his client is under a disability and unable to make decisions]. Mr. Collins stated that the committee would not be able to provide an ethical opinion or guidance on this issue and that counsel should proceed under existing procedural or substantive law.

[RECORD—P. 187] 4.

Although Rule 1.14 suggests the possibility of a curator, it is clear that that portion of Rule 1.14 is dealing with civil matters. Counsel does not believe there is any authority for a curator to make decisions

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in criminal cases on behalf of his client and further, does not believe that such decisions should or can be made by a curator.

5.

It is anticipated that expert psychiatric testimony in this cause will show that the decision making processes of the defendant are so impaired as to render them completely unreliable.

6.

Counsel represents to the Court that there are no close family relatives available to appoint to make decisions on behalf of Mr. Perry and further, even if such relatives were available, they would not be eligible for appointment due to the nature of the crime accused in this matter.

7.

Counsel desires to undertake to make these decisions on behalf of Mr. Perry, keeping Mr. Perry's best interests at heart at all times, in order that adequate representation might be given. Other than "a Motion to Appoint a DoGooder" counsel knows of no other method to adequately protect Mr. Perry's rights and to competently and timely exercise the decision making that must be done in this case.

8.

Movers desire that this motion be kept under seal and that any hearing held in this matter be held in chambers ex parte.

9.

Counsel certifies that they have read the appropriate rules of professional responsibility and there is no guidance other than what is attached.

10.

In the alternative, mover desires that an experienced criminal lawyer, who has practiced in the field of death penalty [RECORD—P. 188] defense, be appointed to make decisions on behalf of Michael Owen Perry and undersigned counsel would be happy to provide the Court with a list of such persons in the Baton Rouge area.

WHEREFORE, MOVER PRAYS that after due proceedings had, there be a hearing in chambers, ex parte, and any record thereof be kept under seal, and that Michael Owen Perry be allowed to make de-

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cisions through counsel or by a representative to be appointed from the Criminal Bar of the City of Baton Rouge who has experience in death penalty defense.

MOVER FURTHER PRAYS for a general and equitable relief as may be allowed by law.

BY ATTORNEYS:

/s/ June E. Denlinger
KEITH B. NORDYKE
JUNE E. DENLINGER
228 Napoleon
Baton Rouge, LA 70802
Phone: (504) 383-1601

* * *

**LETTER TO JUDGE HYMEL FROM
KEITH B. NORDYKE**

[RECORD—P. 193]

Nordyke and Denlinger

Attorneys at Law

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Baton Rouge, Louisiana 70802

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Baton Rouge, LA 70821

June 22, 1988

Honorable L. J. Hymel
Judge
19th Judicial District Court
222 St. Louis Street
Baton Rouge, Louisiana 70801

Re: *State of Louisiana v. Michael Owen Perry*
Number: 9-85-472

Dear Judge Hymel:

I enclose herewith an objection to additional evidence which has been attached to various state briefs in this matter. I understand Your Honor does not want this matter being set for hearing therefore, we would appreciate this objection being filed into the record so that our rights for appellate review are reserved if necessary.

Thanking you for your cooperation and attention, we remain

Very truly yours,

NORDYKE AND DENLINGER
/s/Keith B. Nordyke
KEITH B. NORDYKE

* * *

[RECORD—P. 194]

* * *

**OBJECTION TO AMICUS BRIEF AND OBJECTION TO
INTRODUCTION OF ADDITIONAL EVIDENCE**

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who respectfully objects to the filing of an amicus brief by the State of Louisiana and to the objection of additional evidence for reasons set forth below:

1.

Mover would object to the amicus brief filed on behalf of the State of Louisiana (Department of Corrections) for the reason that the Department of Corrections has no interest in this matter and no cognizable standing to file an amicus brief. Further, Michael Owen Perry perceives an amicus brief by *the state* as merely an attempt to get a "second bite of the apple". There is no showing anywhere that the Attorney General's office is not sufficiently motivated or prepared to handle this case. In other words, it seems that "the state is the state" and that an additional opportunity to file a brief is being given the state by use of an amicus brief.

2.

Attached to the amicus brief and further, attached to the state's original memorandum in this matter, is evidence adduced after the trial of this matter held in April, 1988. Michael Owen Perry vigorously objects to the introduction of this evidence for numerous reasons including but not limited to the following:

1. The evidence is hearsay;
2. The evidence was not taken subject to cross examination
3. The evidence purports to be opinion testimony however no qualification of the expert has been had, and Michael Owen Perry believes that the physicians in this matter are the best experts.
4. Michael Owen Perry has been denied due process as defined in *Ford v. Wainwright* in that the introduction of this evidence completely denies Michael Owen Perry an opportunity to respond and to be heard.
5. Any evidence obtained from Michael Owen Perry in addition to being uncross-examined, was in violation of his right to coun-

sel in that said evidence was taken [RECORD—P. 195] from Michael Owen Perry while he was either incompetent or without the advice of his counsel and certainly without the knowledge of his counsel both in violation of the Fifth and Sixth Amendments to the United States Constitution.

3.

For the above and foregoing reasons and based on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Louisiana Constitution plaintiff objects to the introduction of any additional evidence.

WHEREFORE MOVER PRAYS that all evidence filed and not connected with the trial of this matter and subsequent to the trial of this matter be stricken and not considered.

BY ATTORNEYS:

/s/ Keith B. Nordyke
KEITH B. NORDYKE
NORDYKE AND DENLINGER
P. O. Box 237
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Telephone: (504) 383-1601

* * *

[RECORD—P. 196]

* * *

OBJECTION TO INTRODUCTION OF ADDITIONAL EVIDENCE

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who objects to the introduction of evidence subsequent to the close of the hearing for reasons set forth below:

1.

Mover understands however has not been favored with a service copy of certain evidence which has been forwarded to the trial court in this matter subsequent to the close of the hearing on April 20, 1988.

2.

In particular, mover has been made aware of a June 7, 1988 letter from Annette Viator, attorney for the Department of Corrections, to the Honorable L. J. Hymel, forwarding certain documentation from the Louisiana State Penitentiary to the trial court.

3.

Furthermore, these documents, which are not introduced into evidence, and have not been subjected to cross examination had been attached to the state's brief in this cause.

4.

The aforereferenced June 7, 1988 letter indicates that a physician at Louisiana State Penitentiary will be following up with weekly reports to Your Honor and mover would respectfully and vigorously object to this procedure as evidence has been taken in this matter and the case has been taken under advisement.

5.

This procedure completely and totally violates defendants rights in this cause as these witnesses were not called by the State of Louisiana at the hearing in this matter (when the state [RECORD—P. 197] had total opportunity to do so) and these documents attempting to be introduced in this fashion solely in an effort to circumvent cross examination and normal evidentiary procedure.

6.

The aforereferenced procedure is violative of Michael Owen Perry's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as all Louisiana corresponding constitutional provisions in that the documents submitted in the aforereferenced fashion have not been tested by cross examination, have not been subjected to scrutiny by counsel, have not been served upon counsel, afford no notice and opportunity to be heard and appear to be derived from Michael Owen Perry without the benefit and advice of counsel.

WHEREFORE MOVER PRAYS that after due proceedings had mover prays that the State of Louisiana be prohibited from introducing any further evidence after 20 April 1988 and further, that all such documentation submitted after 20 April 1988 be stricken from the record.

MOVER FURTHER PRAYS that the State of Louisiana be ordered and prohibited from further attempts at providing documentation to this Court without:

- a. Forwarding a copy to opposing counsel.
- b. Noticing a hearing and producing the witnesses and the opportunity to be heard.

BY ATTORNEYS:

/s/ Keith B. Nordyke
 KEITH B. NORDYKE
 NORDYKE AND DENLINGER
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**LETTER TO ANNETTE VIATOR FROM
 KEITH B. NORDYKE**

[RECORD—P. 204]

Nordyke and Denlinger

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 P. O. Box 237
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June 22, 1988

Ms. Annette Viator
 Department of Corrections
 P. O. Box 943-4
 Baton Rouge, Louisiana 70804

Re: Michael Owen Perry

Dear Annette:

* * *

As attorney for Michael Owen Perry I would respectfully request at this time that all medication to Michael Owen Perry be discontinued until such time as the state has complied with the statutory procedures set forth in Title 15 of the Louisiana Revised Statutes.

* * *

[RECORD—P. 305]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
 John A. Dixon, Jr.

Associate Justices
 Pascal F. Calogero, Jr.
 Walter F. Marcus, Jr.
 James L. Dennis
 Jack Crozier Watson
 Harry T. Lemmon
 Luther F. Cole

Clerk of Court
 Frans J. Labranche, Jr. 301 Loyola Ave., 70112
 Telephone 504-568-5707

August 29, 1988

Hon. L. J. Hymel
 Judge, 19th Judicial District Court
 222 St. Louis St.
 Baton Rouge, LA 70801

Re: No. 88-KD-2239
State of Louisiana vs. Michael Owen Perry

Dear Judge Hymel:

This is to advise that the Court took the following action, this date, in the above entitled matter:

"The order of the trial judge dated August 26, 1988 in the minutes of court requiring forced medication of defendant pending the hearing on September 30, 1988 is stayed pending orders of this Court."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
 FRANS J. LABRANCHE, JR.
 Clerk of Court
 * * *

[RECORD—P. 314]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
 John A. Dixon, Jr.

Associate Justices
 Pascal F. Calogero, Jr.
 Walter F. Marcus, Jr.
 James L. Dennis
 Jack Crozier Watson
 Harry T. Lemmon
 Luther E. Cole

Clerk of Court
 Frans J. Labranche, Jr. 301 Loyola Ave., 70112
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September 23, 1988

Hon. L. J. Hymel
 Judge 19th JDC
 222 St. Louis Street
 Baton Rouge, La. 70801

In Re: *State of Louisiana vs. Michael Owen Perry*
 No. 88-KD-2239

Dear Judge Hymel:

This is to advise that the Court took the following action on September 22, 1988 with regards to the above entitled matter:

"Relator's motion to stay the September 30, 1988 hearing is denied."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
 FRANS J. LABRANCHE, JR.
 Clerk of Court
 * * *

EXCERPTS FROM SANITY HEARING HELD**APRIL 20, 1988****[RECORD—P. 505]**

* * *

MR. NORDYKE: Dr. Jimenez, if you will please take the stand so we can get you out of here.

* * *

[RECORD—P. 509] [EXAMINATION OF DR. THERESITA JIMENEZ]

* * *

Q Dr. Jimenez, you were appointed by Judge Hymel to examine Mr. Michael Owen Perry, were you not?

A Yes, sir.

Q And, of course, you're familiar with Mr. Perry because you were, I believe, his treating physician in the Feliciana Forensic in '83 and '84?

A That's right, sir.

Q And I believe you were also the medical director or the psychiatric director of Feliciana Forensic during those years, were you not?

A Yes, sir.

Q Okay. And on February 4th of 1988 I believe you went to Louisiana State Penitentiary at Angola and evaluated Mr. Perry, is that correct?

A Yes, sir.

* * *

[RECORD—P. 511] I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die.

Q What facts went into that opinion, doctor?

A When I went to see Mr. Perry that day he was fairly cooperative but he was evasive with the type of answers and mood that he was in. He indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the

interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. He also talked about his lawyer had not defended him very well because he was a member of the Mafia. And he was very inconsistent with information that he was giving. He was—I also felt at that time that if we could readjust the medication that we would be able to get him much better.

Q I believe you've diagnosed Mr. Perry as having Schizoaffective Disorder, is that correct?

A That's correct, sir.

Q Would you please tell the judge what Schizoaffective Disorder is and what the symptoms of Schizoaffective Disorder may be, including the bipolar nature and that sort of thing?

A Schizoaffective Disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also a problem with his feeling tone or the defective [sic] component. When they are in the state of acute illness they **[RECORD—P. 512]** usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the Schizophrenic component of the illness.

* * *

[RECORD—P. 513] Q Dr. Jimenez, my first interest is you have previously, have you not, diagnosed Michael Perry as being Schizoaffective Disorder?

A Yes, sir, I did.

Q And do you classify that as a major mental illness?

A Yes, sir.

Q Okay. And can that be acute at times and disappear and fade out at other times?

A The symptoms would get better at some point but the illness would be there. It has to be controlled by medication.

* * *

[RECORD—P. 514] Q All right. Now you mentioned that this is a thinking disorder. Can you give me some examples of how this thinking disorder would affect any one of us? I mean how would it make our lives different having a thinking disorder labeled as you have Schizoaffective Disorder?

A Well, if you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. And . . .

Q And if—go ahead.

A Sometimes you would think that you are somebody that you really are not. And that's like when you think you are God.

Q Okay. Now if you think people are out to get you when they're not is there a label that psychiatrists attach to that phenomena?

A Paranoia.

Q And do you conclude that paranoia is an element of a Schizoaffective Disorder?

A It's a part of the problem but some people can also be paranoid without being Schizophrenic.

* * *

[RECORD—P. 515] A * * * Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association.

Q Did you say good or bad association or disassociation?

A Loose, loose.

Q Loose associations. And how do you determine a loose association?

A A loose association, uh, you would note when you are talking to a person and the answers that they give you are—or when they give you information there is no cohesiveness or they just don't stick together.

* * *

[RECORD—P. 518] BY THE COURT:

Q Dr. Jimenez, while you're looking for that, when you examined him on February 4th of this year at my request do you know whether or not Mr. Perry was on medication then?

A Yes, sir, he was on medication, a small amount of medication, but he was not taking it regularly.

Q What type of medication and what dosages?

A Haldol, and I think he was taking ten milligrams of Haldol.

Q Is that a daily prescription?

A Yes, sir, he had often times refused it. In fact, at that time that I saw him I think he was just restarted or he had just started agreeing to take the medicine.

Q What kind of drug is Haldol and what is its purpose and what does it do and what affect, in your opinion, did it [RECORD—P. 519] have and does it have on Michael Owen Perry?

A It's a psychotropic medication. It's supposed to get the thinking process more delusiveness, more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid. It's supposed to help his illness get better. That's the purpose of keeping him on the medication. At one time he was also tried on Lithium Carbonate but he did not do too well and he developed too many side effects so that was discontinued.

* * *

Q Do you know of your own knowledge or have you reviewed the report showing when he was placed on the Haldol?

A I was the one who started that on him back when he—when he first arrived he was doing well. And at that time I didn't feel that he was having any mental illness because he was really—other than being hostile and uncooperative [RECORD—P. 520] at that time. We did not then put him on any medication, really just tried to observe him and referred him for some testing which was done. And then his behavior became worse and he was very hard to deal with and he was causing a lot of—making a lot of threats so he was started on medication. He did better after that but then we had problems also with the side effects so we pretty much had to readjust his medicine regularly and watch him closely. He also has a problem about wanting to take

medication. He really never was interested in taking medication.

* * *

[RECORD—P. 534] Q Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A No, sir.

* * *

[RECORD—P. 539] MR. NORDYKE: Now that we're back on record, Your Honor, in connection with this proceeding I would offer, introduce and file into evidence, into evidence as Exhibits Two, Three and Four various medical records, the originals of which I'll be putting into evidence, copies of which I have provided to everybody, including the physicians in this case in bound format.

THE COURT: Which volumes [RECORD—P. 540] are those?

MR. NORDYKE: It varies. Exhibit Two, Your Honor, corresponds with volume six. This is the Lake Charles Mental Health records.

* * *

[RECORD—P. 542] THE COURT: Let it [Exhibit Two] be filed.

* * *

[RECORD—P. 543] THE COURT: Which are the Feliciana Forensic documents. The Court will allow them [Exhibit 3] to be filed as such.

* * *

[RECORD—P. 544] THE COURT: Let them [Exhibit 4] be filed as marked.

* * *

MR. NORDYKE: And, D-5 will be the Angola records

* * *

[RECORD—P. 545] THE COURT: Let that be filed as Exhibit Five.

MR. NORDYKE: And we will supplement the record with that at

the next break. We will call Dr. Aris Cox, please.

* * *

[RECORD—P. 546] [EXAMINATION OF DR. ARIS COX]

Q You are one of Mr. Perry's treating psychologists at Angola, are you not?

A No. I'm his treating psychologist [sic] at Angola, yes.

* * *

[RECORD—P. 552] A I have not noticed him to have any symptoms of tardive dyskinesia.

* * *

[RECORD—P. 553] A Well, there are medicines that can be given for side effects that improve the extra-paramental symptoms, and also discontinuing neuroleptic medication can prevent it.

* * *

A I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him [RECORD—P. 554] back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

* * *

BY THE COURT:

Q Who made the decision, it you know, to place him on Haldol?

A One of the other psychiatrists there, a Dr. Jalisonne, and Dr. Montero has seen him also and they had put him on the medication.

* * *

Q * * * But my question is do you agree with [RECORD—P. 555] their . . .

A That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q And does Haldol affect him beneficially?

A Yes, sir, when he takes it in adequate doses it affects him beneficially.

Q What is an adequate dose, in your opinion?

A Thirty milligrams a day, or more.

[RECORD—P. 559] Q *** Could you give me your definition of Schizoeffective Disorder, please?

A It is a psychotic illness characterized by a mixture of symptoms which include mood swings, disorganized thought processes, and certain other symptoms, such as, fixed false beliefs, such as, delusions, response to non-existent stimuli, such as, hallucinations, and disorganized thinking.

Q You used another word on me in your definition that I want you to define for me and that is psychotic illness.

A Well, psychotic illness is generally accepted as being an impairment of mental functioning to such an extent that the person is unable to meet the ordinary demands of life, I believe the AMA says. And, also, that there specifically is meant that there contact or appreciation of external reality is impaired. They hear things that aren't there, they see things that aren't there, they misinterpret what goes on around them.

[RECORD—P. 561] A To me, the changes that have occurred in him, his response to medication has been valuable to me in reaching conclusions about him.

Q Explain to me why.

A Because he gets better when he takes medication and he gets worse when he doesn't. And I think this is indicative of the fact that he has a process going on that responds to the medication. And, secondly, I think argues against the fact that he's malingering because in my experience people who malingering tend to do it whether they're on medication or not.

[RECORD—P. 567] Q Now you mentioned to me also that there was neuroleptic medication?

A Yes, sir.

Q Could you give me a definition for that?

A Neuroleptic medications such as Haldol is the name applied to these medications which are given to people for certain psychiatric illnesses, and they basically suppress, control, or improve the symptoms of the illness.

Q Okay. And what illness is the specific case Mr. Perry endures?

A He's being given this drug because he has a diagnosis of [RECORD—P. 568] Schizoeffective Disorder.

Q And this neuroleptic drugs will suppress what particular symptoms of Schizoeffective Disorder?

A Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make him less labile and agitated.

Q Okay, so you told me he would become passive, it will reduce his delusions . . .

A Not passive, but he will . . .

Q Less hostile?

A Less hostile, less aggressive, less bouncing around off the wall.

Q All right, so, what else do we have besides less hostile, and no delusions or reducing . . .

A Thinking more coherently, and more in contact with his environment.

Q More coherently means what?

A Well, more coherent means that he could sit down and give me—I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for ex-

ample, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, [RECORD—P. 569] to something else that is completely unrelated.

* * *

[RECORD—P. 571] A We were discussing the issue of the man's competency and I said it has to do with whether or not he's on medication or not. When he's on medication I think he's competent, when he's not I don't think he is. And he [Mr. Nordyke] was aware that Michael was being given medication at Angola and he was taking it. And he indicated to me the he was going to advise him to quit taking it or see to it that he stopped taking it.

* * *

[RECORD—P. 573] A Is a specific motor—there's two specific motor pathways in the nervous system, the parameatal and the extra-parameatal motor systems. They control motor movement and coordination. These drugs have affects on so-called extra-parameatal system and produce certain movement disorders in patients.

Q Extra-parameatal . . .

A Parameatal.

Q . . . parameatal means controlling motor movement?

A Yes.

Q And how does that relate to Mr. Perry?

A Well, it relates to Mr. Perry that he develops sometimes these symptoms when he is taking Haldol. These symptoms are a recognized side effect of this class of drug.

* * *

[RECORD—P. 574] A Do I think he has tardive dyskinesia now?

Q Yes.

A No, I do not think he has it now.

* * *

[RECORD—P. 579] MR. NORDYKE: Dr. Curtis Vincent, please.

* * *

[RECORD—P. 587] [EXAMINATION OF DR. CURTIS VINCENT]

Q What was your job at Feliciana Forensic Facility when you were there?

A It varied some over the years that I was there. For a while I was acting chief psychologist whenever I was hired in 1979 until I hired someone to be the chief psychologist there. Once I hired someone for that position I became a clinical psychologist simply working there in that position. Through those years more than anything else I was doing psychological evaluations of individuals to help determine competency to stand trial, sanity, competency for other issues. I also did some treatment, individual and group. I put together and managed a program to treat some of the patients who were there.

* * *

[RECORD—P. 589] Q Dr. Vincent, you were appointed by the Court to evaluate Mr. Michael Owen Perry with reference to his competency to be executed, were you not?

A Yes, I was.

Q And as I understand your report you went to Angola and evaluated him on March 5th of 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 590] He did indicate that he knew that he would be executed if he were found competent to proceed. * * * He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked [RECORD—P. 591] about something completely irrelevant.

* * *

[RECORD—P. 592] Q Did Mr. Perry indicate to you that he was God?

A Yes, he indicated at least at one point that he was God.

Q What about his marital status?

A He told me that he had married a woman named Susan Bordelon since being at Angola and that he was—well, he told me that he had married her. I didn't go into any further detail after that.

* * *

Q What about auditory hallucinations?

A He told me at that point that indeed he was hearing voices in his head talking to him and telling him various things. [RECORD—P. 593] And I asked him in particular what those were and very often they were profanities. And at one point he blurted out that the voice was saying, this person is innocent. He also indicated to me that he had been having auditory hallucinations at the time of the offense.

* * *

A I also evaluated him in 1983 at Feliciana Forensic

* * *

Q I believe in 1983 your diagnosis was that of Schizoaffective Disorder. Has that changed?

A I believe that the diagnosis stands today, the same diagnosis.

* * *

[RECORD—P. 594] A I'm assuming he was taking medication at that point.

Q Okay.

A The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. * * * [RECORD—P. 599] There are times when an individual can be administered medication and he can put it in his mouth but not swallow it. * * *

Q Do crazy people and not crazy people both fain [sic] taking medication?

A Yes, they do.

* * *

[RECORD—P. 615] Q All Right, so, this psychological screening

your conclusion was a psychotic disorder characterized by high level of suspiciousness, coupled with a tenuous grip on reality. I mean . . .

A That's one of my conclusions.

* * *

[RECORD—P. 616] Q What treatment would you suggest?

A With the psychotic thinking that I see in him as of March, uh, I think medication would be the primary treatment modality to use.

* * *

[RECORD—P. 626] Q Is it correct to say that your conclusion was that he had an understanding of the functions of the court?

A One of my conclusions was that he indeed understood the functions—many of the functions of the court and he understood the rule[sic] of the various members of the court, yes.

* * *

[RECORD—P. 628] Q All right. But you also say that he does understand the charges and did understand the results of being found competent and he does understand the courtroom (inaudible) if we may use that terminology for the functions of the different parties, correct?

A Yes, that's correct.

* * *

[RECORD—P. 629] A As of March 5th, as I indicated, he was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders and around that time. And that was very inconsistent. He was also very tangential, he had some difficulty paying attention and as a result I would see his having some difficulty assisting in his defense today, for instance.

* * *

[RECORD—P. 634] MR. NORDYKE: Dr. Estes.

THE COURT: Dr. Estes, you have been called as the next witness.

[RECORD—P. 637] [EXAMINATION OF DR. GLEN ESTES]

* * *

Q Dr. Estes, you were appointed to evaluate Michael Owen Perry, were you not?

A That's correct.

Q And of the three persons that have preceeded you on the witness stand I believe you examined him latest in time, on March 9th, 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 641] A He did not tell me that he was married to Suzanne Bordelon, he told me that he was married at age seven, however.

* * *

[RECORD—P. 643] Q You indicated that you wished to be relieved of any responsibility for treatment of Mr. Perry.

A That's correct.

Q Besides not functioning in a prison setting except at the request and volunteering to do it for the judge, would you pursuant to his request volunteer to do it? That is, treat Mr. Perry.

A No, I would not volunteer to do that.

* * *

[RECORD—P. 644] Q * * * tell me can you treat a man to make him sane so he can be executed?

A Can I . . .

THE COURT: That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. Let's go forward.

Q Doctor, do you have any moral or ethical dilemmas presented in a case of this nature?

MR. NORDYKE: Same objection, judge.

THE COURT: That's not his decision to make, that's my decision if we ultimately get there, Mr. Salomon.

* * *

[RECORD—P. 649] Q How many times did you meet with Mr. Perry?

A Once.

Q For what period of time?

A About an hour.

* * *

[RECORD—P. 660] THE COURT: Let the record show the defendant is in court with counsel and the State is represented by the Assistant Attorney General. I spoke briefly with defense counsel in the hallway outside the courtroom and I was advised that the defendant will be called as a witness. The court reporter will, of course, attempt to make as best a transcript as she possibly can but in the event that that is not possible I understand that the Defense, and I'll ask the State, if you have any objection to submitting the defendant's testimony on the video tape itself. Mr. Salomon, would you have any objection to that? We're going to probably make a transcript but what I'm saying is it may not be possible. I don't know if it is or not but whatever we get I'm going to submit the video tape also. Any comments or thoughts or objections you have on that?

MR. SALOMON: Yes, judge, I'm going to object just because I'm not sure that's within court rules and permitted by the State Supreme [RECORD—P. 661] Court. And that's going to be my basis.

THE COURT: Your objection is noted and overruled. As I've said, the court reporter will attempt to make as best a transcript as possible but in the even she's not able to do so the Court will submit it to higher courts in the form of this video cassette. So, with that, do you want to call Mr. Perry?

MR. NORDYKE: We will call Mr. Perry as an exhibit.

THE COURT: If you would step up, please.

MR. SALOMON: As an exhibit or as a witness?

THE COURT: He's being called as a witness. If you would raise your right hand and be placed under oath, please.

* * *

[RECORD—P. 663] [EXAMINATION OF MICHAEL PERRY]

Q * * * A minute ago you told me you were ninety percent. What is that?

A Well, like I told the judge, and I didn't mean it, but I was struck by the voices, you know. * * * [RECORD—P. 667] Now the truth is is that the voices got me. I wanted to commit suicide the day before I committed five counts of murder. A lot of people saw me do that. A lot of kids learned that. One lady is dead. I want her alive. You said you'd do that. Now once those voices get you—I fought it for twenty years of solid pain. I said, no, I don't want to do that, that's begging. That's what they did to me, they begged me for ninety years. They took it. So I said, okay, I join. Then they killed me for twenty years. Ten years of that was pain, you know. So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question

* * *

[RECORD—P. 670] Q When were you born, Michael?

A December 3rd, 1954.

Q And who were your parents?

A Chester Adam Perry.

Q And who was your mother?

A Eve, they said Eve. That's what I first heard. And they said—like I read the bible thirteen years, solid pain. Mr. Hymel was a witness to that, you know. I wish you would respect the man and give up, you know, let the man send me to Jackson and have all of that sex activity if that's what they want to do with me, finish it off, you know. Uh, Rene, I like you. I'm shocked to death that you become against me. Uh, I want to give you that but if you don't like it I'll double it. That's my life. I have the right to defend my life, you know. I didn't do it but I know who did. And but, you know, that's whenever it started on me, you know, that's whenever it started. That's between me and you, you know. You told me to say that last night. We met. I ain't going to lie about it, you know, because I'm in front of the microphone. That thing is a cobra. You can't fool me, you know. We spent twenty years together and you beat the hell out of me. That's a legal word to say. I don't know what happened to the camera but you said I'd be on camera but I don't—there it is right there. But anyway, uh, I mean I told you I'd tell you the truth, too, you know, because I like to have fun with you. Uh, I know [RECORD—P. 671] your wife. We met before. I don't know why she likes me, uh, she said ninety percent. I said a hundred per-

cent, you know. And so I'm guilty, you know, and I'll pay for it. And the world is going to double. But I was born December 3rd, 1954 and I'm nine percent crazy, that's the truth, that's forever. I'm nine percent crazy. And, uh, that medicine they put me on I'm going to have to file suit for ninety million years.

* * *

[RECORD—P. 691] THE COURT: The Court will take this matter under advisement. I will give Defense counsel * * * two weeks, to file any memorandum in support of your [RECORD—P. 692] position * * * You have until the 20th of May at 5:00 p.m. to file a response, Mr. Salomon, if you wish to do so. * * * I will rule on this case at 9:00 a.m., May 26th.

MR. SALOMON: And, Your Honor, uh, is there something special you wish to be addressed in this memoranda?

THE COURT: I think the issues that have been formed. I think all of you are familiar with the Perry case from the Supreme Court, the Ford versus Wainwright decision, the issue of—one issue raised by one of the witnesses today is whether or not the Court has the authority or whether or not a defendant has the right to refuse medication. That's an issue, also.

* * *

**EXCERPTS FROM PROCEEDINGS HELD
AUGUST 26, 1988**

[RECORD— P. 698]

THE COURT: * * * The first matter that the Court is going to address today is the defense objection to the Court considering these **[RECORD—P. 699]** weekly or monthly reports filed into the record of this case by the officials of the Department of Corrections. Those reports were filed at my request, or sent to this Court by my request. * * * **[RECORD—P. 700]** Next business before the Court is that the Court is, based on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jimenez to re-examine the defendant relative to his competency as set up by the Louisiana Supreme Court in the original Michael Owen Perry decision. * * *

[RECORD—P. 701] THE COURT: We'll do this at 10:00 that morning, September the 30th at 10:00 a.m. And, of course, the defendant will be brought into court for the purposes of that hearing. Pending that hearing, pursuant to RS 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant, as to be determined by the medical staff of the Department of Public Safety and Corrections.

* * *

**EXCERPTS FROM SANITY HEARING HELD
SEPTEMBER 30, 1988**

[RECORD—P. 712] THE COURT: * * * Dr. Jimenez is ill and will not be able to be here today, so we'll take her testimony at a later date. And at this **[RECORD—P. 713]** time, the Court will call Kovac as a witness. Step up, please.

* * *

[RECORD—P. 714] DR. KAY BRASIER KOVAC, called by the Court as a witness to testify herein, after being duly sworn, testified, as follows:

* * *

A My name is Kay Brasier Kovac, I'm currently employed at Louisiana State Penitentiary, Angola. I have been medical director there since October of 1985.

* * *

[RECORD—P. 722] THE COURT: Okay, I'll let Defense counsel question Dr. Kovac. Which one of you wants to question her?

MR. NORDYKE: I'll take it, Your Honor.

* * *

[RECORD—P. 724] Q And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A It depends on—just in my limited experience with Michael, it depends on whether he had taken his medication.

Q But it does vary from day to day?

A Well, just using this example—this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q That's because you gave him—that's because he was given a shot of Haldol-D on September 3rd?

A That's correct, because he had his medication.

* * *

[RECORD—P. 731] Q And in your administrative managerial capacity, as a supervising physician at the Angola State Hospital, did you

see some correlation between the acceptance of medication and this behavior you described as being acutely psychotic?

[RECORD—P. 732] A When Michael has not taken his medication he's had—you know, gone into these episodes.

[RECORD—P. 735] THE COURT: Let the record show *** Dr. Cox has been called by the Court as a witness and has been placed under oath.

[RECORD—P. 747] THE COURT: * * * Gentlemen, as I've indicated, the only other person whose testimony I'd like to hear is that of Dr. Jimenez who is not here today, as I told you the reason why. And pursuant to the bench conference we have decided on October 21st at 10:00.

EXCERPTS FROM SANITY HEARING HELD OCTOBER 21, 1988

[RECORD—P. 761] [EXAMINATION OF DR. JIMENEZ] Q I have just two questions, in response: The mood, affect, speech and coherence that you found fairly appropriate on these two visits are solely the result of the Haldol-D, is that true?

A That's right, sir.

Q And in summary—and I don't want to put words in your mouth—but, in summary, isn't it correct to say that if Michael is given large amounts of Haldol-D, he can be, he can, on occasion, be appropriate? And, now, on—if he is not given Haldol-D, he is going to be crazy?

A That's accurate, in the sense that the dosage of the medication is being readjusted based on the mental status and behavior of the patient.

[RECORD—P. 763] BY THE COURT: Gentlemen, I have reviewed your various briefs that you've submitted throughout these proceedings, and I have reviewed 'em, I've done my own independent research and I am prepared to rule. Is there any further argument not included in your brief or memoranda that you want to state at this time, Mr. Nordyke?

MR. NORDYKE: Your Honor, I don't believe so. I think everything that we have stated is either objected to in written form or else argued.

What about you, Mr. Giarrusso?

MR. GIARRUSSO: Likewise, Your Honor.

And, Ms. Denlinger?

MS. DENLINGER: Yes, Sir.

[RECORD—P. 766] BY MR. NORDYKE: The only thing I would point out in rebuttal, Your Honor, is the doctor's testimony is clear, that all things were said to the doctor on the two occasions in September were the result of the Haldol-D; that squares the issue.

[RECORD—P. 794] [BY THE COURT]: So I am going to set an appeal return date, or a writ perfection date, thirty days from today. That date will be November the 22nd. Assignments of error to be filed by November 16th. Transcript to be filed by November 10th.

And the Court will stay the execution of the judgment entered today.

APPENDIX B
LOUISIANA CODE OF CRIMINAL PROCEDURE,
TITLE XXI, CHAPTER 1 "MENTAL INCAPACITY
TO PROCEED"

Art. 641. Mental incapacity to proceed defined

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Official Revision Comment

(a) The test of mental incapacity conforms with the prior law and is a test that has been almost universally adopted. It is a combination of the formula stated in Art. 267 of the 1928 Louisiana Code of Criminal Procedure and the clearly stated application of that principle in Sec. 4.04 of the A.L.I. Model Penal Code. The A.L.I. Comment states:

"More commonly however, the statute merely refers to 'insanity' or 'unsound mind' but, when that is so, the term has almost always been interpreted judicially to refer to a defendant's incapacity to understand the proceedings or to participate in his defense." The Comment further points out that in England also, "... the inquiry appears to be genuinely focused on the defendant's capacity to understand and to defend. See Royal Commission on Capital Punishment, Report (1953) par. 223."

(b) The effect of amnesia which renders the defendant unable to remember the crime or to account for his conduct or whereabouts on that occasion, is generally stated in *State v. Swails*, 223 La. 751, 66 So.2d 796 (1953). In *Swails*, where the defendant had pleaded insanity at the time of the crime as a defense, the Louisiana Supreme Court rejected the claim of amnesia as lack of capacity to stand trial; and Justice McCaleb briefly stated (66 So.2d at 800):

"This contention would be very forceful and persuasive were this a prosecution in which the accused was pleading not guilty for, in such case, his inability to inform his counsel of any

of the facts regarding his own movements in relation to the charges against him would materially affect him in his defense. But, here, appellant is pleading insanity at the time of the commission of the crimes—a special defense under our law. LSA-R.S. 14:14 and 15:261. His alleged amnesia as to the events occurring at, before and after the crimes were committed is not a factor which hampers his defense. On the contrary, the very fact that appellant does not remember anything concerning his alleged criminal acts may be of material aid to his counsel in their presentation of a case of insanity and his testimony, if he sees fit to take the stand, may have considerable weight with the jury.”

Alcoholic amnesia, consisting of the defendant's failure to recollect his behavior while under the influence of excessive alcoholic beverages is never a bar to trial, since it is not “a result of a mental disease or defect.” *State v. Palmer*, 232 La. 468, 94 So.2d 439 (1957).

Art. 642. How mental incapacity is raised; effect

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Official Revision Comment

(a) Although present incapacity to stand trial is ordinarily urged by the defense, it may be raised by the district attorney or on the court's own motion. It is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense should not be brought to trial while that condition exists. Art. 267 of the 1928 Code of Criminal Procedure, as amended in 1932, similarly provided for appointment of a lunacy commission whenever “the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that (he) is unable to understand the proceedings against him or to assist in his defense.” This provision was applied in *State v. Hebert*, 186 La. 308, 172 So. 167 (1937), to uphold the trial judge's appoint-

ment of a lunacy commission on the district attorney's suggestion that the defendant might be mentally unfit to proceed with the trial, and despite the fact that no plea of present insanity had been tendered by the defense.

(b) When the question of the defendant's mental capacity to proceed has been raised, all proceedings in the case are stayed until that issue is determined, thus making sure that no action prejudicial to the defendant will be taken until the defendant's capacity to understand the nature of the proceedings and to assist in his defense has been established. An exception is made as to *institution* of the criminal prosecution. This may sometimes be necessary in order to prevent the time limitations on the institution of the prosecution from running out while the proceedings against a mentally incapable defendant have been stayed. Only the time limitations *upon commencement of trial* are interrupted by insanity of the defendant. See Art. 579.

Art. 643. Order for mental examination

The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed. Prior to the ordering of any such mental examination, the court shall appoint counsel to represent the defendant if he has not already retained counsel. *Amended by Acts 1975, No. 325, § 1.*

Official Revision Comment

(a) The ordering of a mental examination as to the defendant's present capacity to proceed rests in the sound discretion of the court. It is not enough that the defense has filed a motion urging the defense, but there must be sufficient evidence to raise a reasonable doubt as to such capacity. Art. 267 of the 1928 Code providing for the defense of present unfitness, has been similarly construed in *State v. Ridgway*, 178 La. 609, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v. Messer*, 194 La. 238, 193 So. 633 (1940); *State v. Washington*, 207 La. 849, 22 So.2d 193 (1945); *State v. Ledet*, 211 La. 769, 30 So.2d 830 (1947); *State v. Green*, 221 La. 713, 60 So.2d 208 (1952). If there is a substantial doubt as to the defendant's mental capacity it is an abuse of discretion for the trial judge to refuse to order a mental examination. See *State v. Allen*, 204 La. 513, 15 So.2d 870 (1943).

(b) The mental examination ordinarily will be limited to a determination of present mental capacity to proceed. It will not include a determination of the defendant's mental condition at the time of the crime, unless the defense of insanity at the time of the crime is urged and "becomes an issue in the cause." *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Criminal Law and Procedure*, 17 La.L.Rev. 404, 411 (1957).

(c) A defendant whose mental capacity to proceed is in doubt may not be qualified to determine his need for legal assistance nor capable of procuring counsel; therefore, this article makes special provision for counsel, because the usual provisions for appointment of counsel at arraignment do not afford full protection of such a defendant's interests. As under former R.S. 15:271, enacted in 1964, this right to counsel is not limited to felony cases.

Art. 644. Appointment of sanity commission; examination of defendant

A. Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies. The court may appoint, in lieu of one physician, a psychologist who is licensed to practice psychology in Louisiana and who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment.

B. The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

C. For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other proceedings.

Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 577, § 1.

Official Revision Comment

(a) Other than the minimal requirements that the members of the sanity commission must be regularly licensed physicians with three years' actual practice, the determination of the qualifications of the members is left in the sound discretion of the trial judge. It is contemplated that Louisiana courts will continue their practice of appointing a psychiatrist or psychiatrists when available, as under a similar discretionary provision of amended Art. 269 of the 1928 Code of Criminal Procedure. Similarly, the coroner will frequently be well qualified to serve as a member of the commission and may be appointed. It is logical to assume that the court will appoint the most competent physicians available—for the value and weight of the sanity commission's report will largely depend on the competency and prestige of its members.

(b) The type of examination and procedures to be followed will be determined by the sanity commission, subject to such general directions as the court may include in the order for examination. The Louisiana Supreme Court has recently affirmed the wisdom of flexible sanity commission procedures, stating: "There is nothing in the statute requiring that an accused be kept under constant observation for any fixed period of time, and the legislature has not therein attempted to dictate to these experts in the manner and method to be employed by them in conducting their examination, undoubtedly feeling, as do we, that they are eminently better qualified to know just exactly how to best carry out their duties in this respect as the particular facts of each case may warrant." *State v. Faciane*, 233 La. 1028, 1048, 99 So.2d 333, 340 (1957); *State v. Augustine*, 241 La. 761, 131 So.2d 56 (1961).

(c) Confinement of the defendant in custody for the purpose of the examination, the right of free access to the defendant at all reasonable times, and the power to procure compulsory attendance of witnesses are all necessary to enable the commission to make accurate and complete investigations.

Art. 645. Report of sanity commission

The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost.

Official Revision Comment

(a) The A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.05(1), authorizes commitment for a period not exceeding sixty days or such longer period as the court determines to be necessary. Art. 269 of the 1928 Louisiana Code provided that the sanity commission should report within thirty days. This article is a compromise. It makes the normal period thirty days after the date of the order of appointment, but allows the court to extend the time for filing the commission's report when additional time is required for the examination.

(b) The requirement that the report be filed in triplicate and copies made available to the district attorney and the defendant, makes the report fully available to all interested parties. Art. 269 of the 1928 Louisiana Code of Criminal Procedure similarly required that the report be made in writing and be accessible to the district attorney and the attorney of the accused. The importance of accessibility of a written copy of the report is shown by *State v. Winfield*, 222 La. 157, 62 So.2d 258 (1952), discussed in *The Work of the Supreme Court for the 1952-1953 Term—Criminal Procedure*, 14 La.L.Rev. 231, 235 (1953). In *Winfield* the trial judge was held to have committed reversible error in determining the issue of present insanity on the basis of a telephone report of the findings of the lunacy commission, rather than waiting for the actual filing of a written report. The underlying basis of the *Winfield* decision clearly appeared in Justice Moise's statement that "The mandatory provisions of the statute—that *the written report of the commission shall be presented to the trial judge and shall be accessible to the district attorney and to the attorney for the accused*—were not followed." (Emphasis by the court.) *Id.* at 161, 62 So.2d at 259.

Art. 646. Examination by physician retained by defense or district attorney

The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination.

Official Revision Comment

This article, following Art. 268 of the 1928 Louisiana Code, continues the right of the defense or of the district attorney, to have the defendant examined by physicians of their own choice. The Comment to a somewhat similar provision of the A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.07(2), states that it "clears up a disputed point in a small numbers of jurisdictions where the defendant may have to have the consent of the warden or some other official before a psychiatrist of his own choosing may examine a defendant who is in custody."

Art. 647. Determination of mental capacity to proceed

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Official Revision Comment

(a) This article adopts the rule of Art. 267 of the 1928 Louisiana Code, and of Sec. 4.06(1) of the A.L.I. Model Penal Code, Proposed Official Draft (1962), that the issue of the defendant's fitness to proceed shall be determined by the court. The A.L.I. Comment to Sec. 4.06(1) lists 11 states and the federal laws (18 U.S.C. § 4244), that exclude a jury trial on the issue of fitness to proceed. Accord: *State v. Ridgway*, 178 La. 606, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v.*

Hebert, 186 La. 308, 172 So. 167 (1937); *State v. Bessar*, 213 La. 299, 34 So.2d 785 (1948); *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949).

(b) The requirement of a contradictory hearing follows the rule of Art. 267 of the 1928 Code of Criminal Procedure. *State v. Hebert*, 186 La. 308, 172 So.2d 167 (1937).

(c) The express provision that the report of the sanity commission is admissible in evidence at the hearing conforms with the A.L.I. Model Penal Code, § 4.06(1) (Tent. Draft No. 4, 1955). The Comment to that provision states that it "may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case in which a report is contested [citing Wis. Stats.]." Nevertheless, full provision is made for utilization of direct testimony of the commission members in explanation and support of their findings.

(d) The last sentence, authorizing the introduction of other evidence, follows through on the right of the defense and the district attorney to have the defendant examined by their own psychiatrist or other physician. The provisions for testimony at the hearing further point up the general proposition that the report is only prima facie evidence of the sanity commission's findings and conclusions. In *State v. Hebert*, 187 La. 318, 174 So. 369 (1937), the supreme Court considered the testimony of the court-appointed physicians and of other witnesses in concluding that the trial judge had erred in adopting the lunacy commission's report of present insanity. The commissioners' report, according to the supreme court, was not supported by their testimony or by the testimony of all witnesses as a whole.

Art. 648. Procedure after determination of mental capacity or incapacity

A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the

defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R.S. 28:2(28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall be maintained in custody at the forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall such custody, care, and treatment exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing

trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from state correctional institutions. *Amended by Acts 1975, No. 325 § 1; Acts 1979, No. 318, § 1; Acts 1980, No. 612, § 1; Acts 1982, No. 495, § 1; Acts 1983, No. 399, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) Committing a mentally incapacitated defendant to a state mental institution for as long as such incapacity continues is in conformity with the usual disposition of such cases. See Art. 267 of the 1928 Louisiana Code of Criminal Procedure.

(b) Appellate review of the court's determination of mental capacity to proceed or of the necessity of ordering a mental examination ~~will follow~~ the normal procedures. If the court improperly refuses to order a mental examination and appoint a sanity commission, the defendant's remedy is to reserve a bill of exceptions and urge this objection as a ground for a motion for a new trial which will be the basis of an ultimate appeal. *State v. Leon*, 177 La. 293, 148 So. 54 (1933). Likewise, the defendant can reserve a bill of exceptions to the court's determination of present mental capacity and have that question reviewed on appeal. *State v. Neu*, 180 La. 545, 157 So. 105 (1934).

The defendant has a right of direct appeal from a determination of present lack of capacity to stand trial when he would prefer an immediate trial rather than commitment to a mental institution. "(A)n appeal lies from such judgment [of present incapacity] because it is final in so far as the only issue involved

in such a proceedings is concerned and is prejudicial because it deprives the party of his liberty." *State v. Hebert*, 187 La. 318, 324, 174 So. 369, 371 (1937); *State v. Gunter*, 208 La. 694, 23 So.2d 305 (1945). *State v. Yaun*, 237 La. 186, 110 So.2d 573 (1956), classified this type of ruling as an appealable final judgment.

The state's appellate remedy, as in the case of other adverse preliminary rulings, is necessarily by immediate appeal for it has no review after an acquittal. Although there are no supreme court decisions in point, a ruling that the defendant is presently incapable of standing trial is final determination of that issue, and the state's case might be seriously prejudiced by the resulting delay in bringing the defendant to trial. Such a determination does not relate to the basic issue of guilt or innocence; therefore the facts may be reviewed on appeal. *Op. Atty. Gen.*, 1942-44, p. 249; *State v. Hebert*, 187 La. 318, 174 So. 369 (1937).

(c) Great hardship may result in some cases, for example, the case of a defendant charged with a nonviolent offense who is committed for a long period pending a finding of present capacity to proceed. In such a situation probation is authorized upon a finding that the defendant is not being helped by continued custody in the mental institution and that he may be released without danger. The public is further protected by the requirement that the probation may be granted only on recommendation of the superintendent of the mental institution and by an order of the committing court. Probation procedures follow the applicable provisions of Art. 657. Conditions of the probation, to be imposed by the court, may include submission to treatment, abstinence from alcohol, special help by parents, or other appropriate requirements designed to aid in recovery and to fully protect the public.

Art. 648.1. Information required prior to admission

No superintendent of an institution shall admit a defendant found by the court to lack the mental capacity to proceed pursuant to Art. 648 unless he is furnished by the court the following information:

- (1) The name and address of the defendant's attorney.
- (2) The crime or crimes with which the defendant is charged and the date of such charge or charges.

(3) A copy of the report of the sanity commission.

(4) Any other pertinent information concerning the defendant's health which has come to the attention of the court such as injuries sustained at the time of arrest or injuries sustained following incarceration. *Added by Acts 1975, No. 325, § 2.*

Art. 649. Procedure when capacity regained

A. At any time after a defendant's commitment, if the superintendent of the mental institution reports to the committing court that the defendant presently has the mental capacity to proceed, the court shall hold a contradictory hearing within thirty days on that issue.

B. Prior to such a hearing, the court shall appoint counsel to represent the defendant if the defendant does not have counsel, and shall order a mental examination by a sanity commission appointed in conformity with Article 644. If the committing court does not hold a hearing within thirty days, the sheriff of the parish from which the defendant was committed shall appear at the institution within seven days thereafter and shall receive and hold the defendant in custody pending further orders of the committing court. If the sheriff fails to appear with a court order and accept custody of the defendant, the superintendent of the state mental institution or the director of the mental health unit shall notify the judicial administrator and the attorney general of such fact. Thereafter the Criminal Court Fund of the parish from which the defendant was committed shall pay to the general fund of the state the sum of one hundred dollars a day until the sheriff appears and accepts custody of the defendant for the court.

C. The district attorney or the defense may apply to the court to have the proceedings resumed, on the ground that the defendant presently has the mental capacity to proceed. Upon receipt of such application the court shall hold a contradictory hearing to determine if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed. The court may direct the superintendent of the mental institution where the defendant is committed to make a report and recommendation prior to such hearing as to whether the defendant presently has capacity to proceed, or may order an independent mental examination by a sanity commission appointed in conformity with Article 644.

D. Reports as to present mental capacity to proceed shall be filed

in conformity with Article 645, and the court's determination of present mental capacity to proceed shall be made in conformity with the appropriate provisions of Articles 646 and 647.

E. If the court determines that the defendant has the mental capacity to proceed, the proceedings shall be promptly resumed. *Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) This article provides a procedure for a redetermination of the present capacity issues when it later appears that the defendant may be capable of proceeding with the trial. The subsequent hearing as to capacity may be instigated by a report by the superintendent of the mental institution to which the defendant was committed, or by an application made by the district attorney or the defense. Certain differences inherent in the two procedures necessitated the partially separate statement.

(b) Under the first paragraph, when the superintendent of the mental institution reports that the defendant presently has capacity to proceed, a contradictory hearing is mandatory. The hearing must be held within thirty days and the defendant must be represented by counsel at the hearing. The requirement of a prompt hearing is fortified by the second paragraph, which authorizes the superintendent of the mental institution to return the defendant to the parish from which he was committed if the hearing is not held within the prescribed thirty days.

(c) Under the third paragraph, when the district attorney or the defense applies to have the proceedings resumed, the court is required to hold a contradictory hearing only if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed, *i.e.*, if there is a *prima facie* showing of present capacity.

(d) In both situations the ordering of an independent mental examination is discretionary with the court. When the superintendent of the mental institution reports that the defendant is capable of standing trial, the court may not feel that a further examination is necessary. When application is made by the district attorney or the defense, it is quite likely that the order for a men-

tal examination will be directed to the superintendent of the mental hospital where the defendant is committed. Such an examination and report will be a part of the services of that state institution, but the staff psychiatrist making the examination will be entitled to reasonable fees as an expert witness, and traveling expenses when he testifies at the hearing. Art. 660. Appointment of an independent sanity commission, in conformity with Art. 644 is also expressly authorized.

(e) Additional examinations by the defense and district attorney will be authorized under Art. 646. The court's determination of the question of regained capacity to stand trial is in accord with *State v. Laborde*, 210 La. 291, 26 So.2d 749 (1946), which held that the court was not limited to or bound by recommendations of the physicians.

Art. 649.1. Prescribed medication; administration

When a person is returned to the committing court from an institution pursuant to Article 649 pending a sanity hearing, and the superintendent of the committing institution deems it necessary that the patient receive prescribed medication, it shall be the duty of the chief administrative officer of the parish jail to make such medication available to the person until such time as the coroner or another physician finds that the medication or its prescribed dosage is no longer necessary. *Added by Acts 1975, No. 325, § 2.*

APPENDIX C

LOUISIANA REVISED STATUTES, TITLE 28, SECTIONS 2 AND 171

§ 2. Definitions

Whenever used in this Title, the masculine shall include the feminine, the singular shall include the plural, and the following definitions shall apply:

(1) "Conditional discharge" means the physical release of a judicially committed person from a treatment facility by the director or by the court. The patient may be required to report for out patient treatment as a condition of his release. The judicial commitment of such persons shall remain in effect for a period of up to one year and during this time the person may be hospitalized involuntarily for appropriate medical reasons upon court order.

(2) "Court" means any duly constituted district court or court having family or juvenile jurisdiction. "Court" does not include a city court, which shall have no jurisdiction to commit persons to mental health treatment facilities in civil or criminal proceedings, except when exercising juvenile jurisdiction.

(3) "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

(4) "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

(5) "Diagnosis" means the art and science of determining the presence of disease in an individual and distinguishing one disease from another.

(6) "Director" or "superintendent" means a person in charge of a treatment facility or his deputy.

(7) "Discharge" means the full or conditional release from a treatment facility of any person admitted or otherwise detained under this Chapter.

(8) "Department" means the Department of Health and Human Resources.

(9) "Formal voluntary admission" means the admission of a person suffering from mental illness or substance abuse desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be formally admitted upon his written request. Such persons may be detained following a request for discharge pursuant to R.S. 28:52.2.

(10) "Gravely disabled" means the condition of a person who is unable to provide for his own basic physical needs, such as essential food, clothing, medical care, and shelter, as a result of serious mental illness or substance abuse and is unable to survive safely in freedom or protect himself from serious harm; the term also includes incapacitation by alcohol, which means the condition of a person who, as a result of the use of alcohol, is unconscious or whose judgment is otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

(11) "Informal voluntary admission" means the admission of a person suffering from mental illness or substance abuse, desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be admitted upon his request without making formal application.

(12) "Major surgical procedure" means an invasive procedure of a serious nature with incision upon the body or parts thereof under general, local or spinal anesthesia, utilizing surgical instruments, for the purpose of diagnosis or treatment of a medical condition. Diagnostic procedures, including, but not limited to, the following, shall not be considered as major surgical procedures:

(a) Endoscopy through natural body openings, such as the mouth, anus, or urethra, to view the trachea, bronchi, esophagus, stomach, pancreas, small or large intestine, urethra, urinary bladder, or ureters, and to obtain from such organs specimens of fluids or tissues for chemical or microscopic analysis.

(b) Sub-cutaneous percutaneous liver biopsy.

(c) Punch biopsy of skeletal muscles.

(d) Bone marrow biopsy.

(e) Lumbar puncture.

(f) Myelogram.

(g) Thoracocentesis.

(h) Abdominocentesis.

(i) Conization of the uterine cervix.

(j) Renal angiography.

(k) Femoral angiography.

(l) Carotid angiography.

(m) Vertebral angiography.

(13) "Mental health advocacy service" means a service established by the state of Louisiana for the purpose of providing legal counsel and representation for mentally disabled persons and to insure that their legal rights are protected.

(14) "Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

(15) "Minor" means a person under eighteen years of age.

(16) "Parent" means a person who is the biological mother or father of an individual or the legally adoptive mother or father of an individual.

(17) "Patient" means any person detained and taken care of as a mentally ill person or person suffering from substance abuse.

(18) "Peace officer" means any sheriff, police officer, or other person deputized by proper authority to serve as a peace officer.

(19) "Person of legal age" means any person eighteen years of age or older.

(20) "Petition" means a written civil complaint filed by a person of legal age alleging that a person is mentally ill or suffering from substance abuse and requires judicial commitment to a treatment facility.

(21) "Physician" means a person permitted to practice and in active practice as a physician under the laws of Louisiana or a person in a post-graduate medical training program of an accredited medical

school in Louisiana or a medical officer similarly qualified by the government of the United States while in the state in the performance of his official duties.

(22) "Psychiatrist" means a physician who has at least three years of formal training or primary experience in the diagnosis and treatment of mental illness.

(23) "Respondent" means a person alleged to be mentally ill or suffering from substance abuse and for whom an application for commitment to a treatment facility has been filed.

(24) "Restraint" means the partial or total immobilization of any or all of the extremities or the torso by mechanical means.

(25) "Substance abuse" means the condition of a person who uses narcotic, stimulant, depressant, soporific, tranquilizing, or hallucinogenic drugs or alcohol to the extent that it renders the person dangerous to himself or others or renders the person gravely disabled.

(26) "Transfer" means the removal of a patient from one mental institution to another without any procedure for admission other than is prescribed by the department.

(27) "Treatment" means an active effort to accomplish an improvement in the mental condition or behavior of a patient or to prevent deterioration in his condition or behavior. Treatment includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, training, the use of pharmaceuticals, and other services provided for patients by a treatment facility.

(28) (a) "Treatment facility" means any public or private hospital, retreat, institution, mental health center, or facility licensed by the state of Louisiana in which any mentally ill person or person suffering from substance abuse is received or detained as a patient. The term includes Veterans Administration and public health hospitals and forensic facilities. "Treatment facility" includes, but is not limited to, the following, and shall be selected with consideration of first, medical suitability; second, least restriction of the person's liberty; third, nearness to the patient's usual residence; and fourth, financial or other status of the patient, except that such considerations shall not apply to forensic facilities:

- (i) Community mental health centers.

- (ii) Private clinics.
- (iii) Public or private halfway houses.
- (iv) Public or private nursing homes.
- (v) Public or private general hospitals.
- (vi) Public or private mental hospitals.
- (vii) Detoxification centers.
- (viii) Substance abuse clinics.
- (ix) Substance abuse in-patient facility.
- (x) Forensic facilities.

(b) Patients involuntarily hospitalized by emergency certificate for mental health treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), (viii), or (x) of this Paragraph, except that patients in custody of the Department of Public Safety and Corrections may be admitted to forensic facilities by emergency certificate provided that judicial commitment proceedings are initiated during the period of treatment at the forensic facility authorized by emergency certificate. Patients involuntarily hospitalized by emergency certificate for substance abuse treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), or (x) of this Paragraph. Judicial commitments, however, may be made to any of the above facilities except forensic facilities. However, in the case of any involuntary hospitalization as a result of such emergency certificate for substance abuse or in the case of any judicial commitment as the result of substance abuse, such commitment or hospitalization may be made to any of the above facilities, except forensic facilities, provided that such facility has a substance abuse in-patient operation maintained separate and apart from any mental health in-patient operation at such facility.

(c) "Treatment facility" shall not include a jail or prison of any kind, or any facility under the control or supervision of the Department of Public Safety and Corrections unless the facility has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility pursuant to R.S. 15:830.1(B); however, a jail or prison shall not be construed as a forensic facility. Only adult inmates sentenced to the Department of Public Safety and Corrections may be admitted to a treat-

ment facility designated pursuant to R.S. 15:830.1(B).

§ 171. Enumerations of rights; restrictions

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or oth-

ers. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of the treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in his medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treat-

ment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts or behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorneys provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient. The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for nonmedical reasons

such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall enter into the person's medical record his response to medical treatment, his current mental status, and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

APPENDIX D
LOUISIANA REVISED STATUTES, TITLE 15,
SECTION 830.1

§ 830.1. Refusal of treatment by mentally ill or mentally retarded inmates

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

APPENDIX E
STATE WHICH EXPRESSLY AUTHORIZES
MEDICATION TO ACHIEVE
COMPETENCY FOR EXECUTION

MARYLAND, Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states:
"An inmate is not incompetent merely because his or her competence
is dependent upon continuing treatment, including the use of medica-
tion."

APPENDIX F**STATES WHICH AUTHORIZE TREATMENT OR STAY
OR SUSPEND EXECUTION
UNTIL COMPETENCY IS REGAINED.**

ALABAMA, Ala. Code § 15-16-23 (1975) authorizes suspending the execution of a death row inmate until the incompetent inmate "is restored to sanity."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4023 (1978) authorizes a condemned inmate, upon being determined by a jury that he is insane, to be taken and confined in a state hospital "until his reason is restored." Ariz. Rev. Stat. Ann. § 13-4024 (1978) dissolves the suspension once the inmate "recovers his sanity."

ARKANSAS, Ark. Stat. Ann § 16-90-506 (1959) orders an incompetent death row inmate "confined in the state hospital until such time as he may recover his sanity."

CALIFORNIA, Cal. [Suspension of Execution] Code § 3703 (1971) and § 3704.5 (1988) order an incompetent death row inmate "taken to a medical facility of the Department of Corrections" and "there kept in safe confinement until his or her reason is restored," and § 3704 (1971) authorizes a new execution date once the defendant "has recovered his sanity."

COLORADO, Colo. Rev. Stat. § 16-8-110 (1986) provides that no person shall be "tried, sentenced or executed if he is incompetent to proceed at that stage of the proceedings against him"; Colo. Rev. Stat. § 16-8-111 (3) (1986) authorizes the inmate's execution for the same offense "after he has been found restored to competency"; Colo. Rev. Stat. § 16-8-112 (2) (1986) provides that the incompetent inmate shall be committed as provided in Colo. Rev. Stat. § 16-8-105 (4) (1986), which authorizes an incompetent defendant committed to a state facility for "care and psychiatric treatment"; Colo. Rev. Stat. § 16-8-114 (1986) provides for a restoration to competency hearing and authorizes the court to "enter any new order necessary to facilitate the defendant's restoration to mental competency"; Colo. Rev. Stat. § 16-8-114.5 excludes any evidence "resulting from a refusal by the defendant to accept treatment" from the court's consideration in reaching a determination as to "the substantial probability that the defendant will not be restored to competency within the foreseeable future."

CONNECTICUT, Conn. Gen. Stat. § 54-101 (1982) orders a stay of execution and the inmate "transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity" and once "such person has recovered his sanity...said penalty shall be inflicted."

FLORIDA, Fla. Stat. § 922.07 (3) and (4) (1985) provide the governor with the authority to order the insane convict committed to a Department of Corrections mental health facility and "kept there until the facility administrator determines that he has been restored to sanity." Fla. Rule Crim. Pro. 3.811 (1987) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it shall not be executed." Rule Crim. Pro. 3.812 (1987) authorizes a hearing de novo on the inmate's competency for execution and allows the court under Rule 3.812 (c) (3) (1987) to "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." Rule Crim. Pro. 3.212 (c) (2) (1989) allows the court to order treatment of an incarcerated prisoner once that inmate has been found incompetent to proceed at any "material stage of a criminal proceeding" under Rule Crim. Pro. 3.210 (1989). Rule 3.212 (3) (1989) allows the court to commit the defendant for treatment to "restore a defendant's competence to proceed" if the court finds "(i) [t]hat the defendant meets the criteria for commitment as set forth by statute; (ii) [t]hat there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future; (iii) [t]hat treatment appropriate for restoration of the defendant's competence to proceed is available; (iv) [t]hat no appropriate treatment alternative less restrictive than that involving commitment is available." Committee Note under Rule 3.211 (1989) explaining the 1988 amendment states that "appropriate treatment may include maintaining the defendant on psychotropic or other medication. See Rule 3.215." Rule 3.215 (1989) provides that "[a] defendant...shall not automatically be deemed incompetent to proceed simply because his satisfactory mental condition is dependent upon such [psychotropic] medication, nor shall he be prohibited from proceeding solely because he is being administered medication under medical supervision for a mental or emotional condition."

GEORGIA, Ga. Code Ann. § 17-10-60 (1988) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1988) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1988) provides that this article is the exclusive procedure for determining competency for execution. Ga. Code Ann. § 17-10-68 (e) (1988) provides that if mental incompetency for execution is proven, the "court shall enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper." Ga. Code Ann. § 17-10-71 (1988) provides that if the convict "regains his or her mental competency" then any previously entered stay of execution is vacated.

IDAHO, Idaho Crim. Court Rule 38 provides only generally that any sentence of death shall be stayed "pending any appeal or review." The Idaho State Legislature repealed Idaho Code § 19-2709 through § 19-2712 regulating competency for execution in 1970. Two years later the State Legislature passed a general competency to proceed statute that includes competency to be punished. Idaho Code § 18-210 (1972) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 66-335 (1981) regulates commitments of mentally ill convicts. Idaho Code § 19-2523 (1982) allows a court "to authorize treatment during the period of confinement...if, after the sentencing hearing, it concludes by clear and convincing evidence that: (a) [t]he defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law; (b) [w]ithout treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant; (c) [t]reatment is available for such illness or defect; (d) [t]he relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment."

ILLINOIS, Ill. Rev. Stat. ch. 38, § 1005-2-3 (1985) provides that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence." Subsec-

tion (4) of that statute provides that "if the offender is found unfit to be executed, he shall be remanded to the custody of the Department of Corrections until he becomes fit to be executed."

KENTUCKY, Ky. Rev. Stat. § 431.240 (1980) provides that the execution of an insane prisoner shall be stayed "until the condemned is restored to sanity." The statute further authorizes the commissioner of corrections to "transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity."

MARYLAND, Md. [Crimes and Punishments] Code Ann. art. 27, § 75A (1987) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. [o]f the fact of his or her impending execution; and 2. [h]e or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. However, the statute expressly defines "incompetence" as not including an inmate whose competency to be executed is achieved and maintained by medication. Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states: "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication."

MISSISSIPPI, Miss. Code Ann. § 99-19-57 (1984) provides that if a convict under a sentence of death becomes insane, "the following shall be the exclusive procedural and substantive procedure....If it is found that the convict is insane...the court shall suspend the execution....The convict shall then be committed to the forensic unit....The order of commitment shall require...a written report be furnished to the court...stating whether there is a substantial probability that the convict will become sane...within the foreseeable future and whether progress is being made toward that goal." The statute further provides that the standard of incompetency for execution should be if the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."

MISSOURI, Mo. Rev. Stat. § 552.060 (1989) provides that "[n]o person

condemned to death shall be executed if, as a result of mental disease or defect, he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." The statute further directs the warden to "order a stay of execution." The insane prisoner is subject to transfer to a mental hospital, and later if he is "certified by the director as free of a mental disease or defect...the governor shall fix a new date for execution...." Mo. Rev. Stat. § 552.050 (1983) authorizes the inmate transferred "to a state mental hospital for custody, care and treatment" for up to 96 hours, after which time the mental health coordinator or head of the facility may file for involuntary detention and treatment. The statute further provides for involuntary treatment for an additional one year.

MONTANA, Mont. Code Ann. § 46-19-202 (1983) provides that if after judgment of death a defendant "lacks [mental] fitness" the execution is suspended and the court "shall commit him to the...state hospital...for so long as the lack of fitness endures...." Once "the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution" unless the court determines that "so much time has elapsed since the commitment...that it would be unjust to proceed...."

NEBRASKA, Neb. Rev. Stat. § 29-2537 (1973) authorizes a court to suspend the execution of a convict who appears to be mentally incompetent "until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. § 176.415 (1987) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. § 176.455 (1977) suspends the execution of an insane inmate "until the convicted person becomes sane" and includes an order to the director of the department of prisons "to confine such person in a safe place of confinement until his reason is restored." The statute further provides that "[i]f the convicted person thereafter becomes sane...the judge...shall enter an order vacating the order staying the execution of the judgment."

NEW MEXICO, N.M. Stat. Ann. § 31-14-6 (1984) provides that once a defendant under judgment of death is found insane as provided in

N.M. Stat. Ann. § 31-14-4 (1953), the court must order that "he be taken to the state hospital for the insane, and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1953) provides that a new execution date will be rescheduled "[w]hen the defendant recovers his reason."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001 (a) (1973) provides that "[n]o person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as 'incapacity to proceed.'" N.C. Gen. Stat. § 15A-1002 (b) (2) (1989) provides that incapacity to proceed may be raised at any time and when the defendant's capacity is questioned, the court "may order the defendant to a State facility for the mentally ill for observation and treatment, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1004 (1985) and N.C. Gen. Stat. § 15A-1006 (1973) require the court to return the defendant to trial "in the event that he subsequently becomes capable of proceeding." If incapacity continues in a felony case for 10 years, the court has authority under N.C. Gen. Stat. § 15A-1008 (1973) to dismiss the charges.

OHIO, Ohio Rev. Code Ann. § 2949.28 (1969) provides that "[e]xecution of the sentence [of an insane convict sentenced to death] shall be suspended pending completion of the inquiry." The comments to this statute cite the standard as "whether he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court." Ohio Rev. Code Ann. § 2949.29 (1969) provides that "[i]f it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution." Ohio Rev. Code Ann. § 2949.30 (1963) states that "if he is subsequently restored" the warden or sheriff shall report such finding to the governor, "who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time for his execution."

OKLAHOMA, Okla. Stat. tit. 22, § 1005 (1981) requires that once "there is good reason to believe" that a convicted death row inmate has become insane, a jury must be impaneled to consider the inmate's competency. If the jury returns a verdict of insanity, Okla. Stat. tit. 22, § 1007 (1981) requires the court to order the defendant "taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored." Okla. Stat. tit. 22, § 1008 (1981) requires the governor to reissue a warrant for the inmate's execution once "the defendant recovers his reason."

SOUTH DAKOTA, S.D. Comp. Laws Ann. § 23A-27A-22 (1979) provides that when a prisoner under sentence of death appears to be mentally incompetent to proceed, the governor is required to establish a sanity commission. S.D. Comp. Laws Ann. § 23A-27A-24 (1979) provides that once the commission finds the defendant mentally incompetent to proceed, the governor "shall suspend execution...and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill." S.D. Comp. Laws Ann. § 23A-27A-25 (1979) provides that once "the defendant is no longer mentally incompetent to proceed...the defendant shall be forthwith returned and delivered to the custody of the warden..., there to be dealt with according to law." S.D. Comp. Ann. § 23A-27A-26 (1979) mandates that the governor must then issue a new warrant commanding the recovered inmate's execution unless the sentence has been commuted or pardoned.

UTAH, Utah Code Ann. § 77-19-8 (1988) provides that the judgment of death may be suspended in cases of suspected incompetency for execution. Utah Code Ann. § 77-19-13 (1988) provides that the condemned inmate shall be examined under the provisions of Chapter 15, Title 77. If it is found that the defendant is incompetent, "the court shall immediately...enter an order for commitment under chapter 15, Title 77." Utah Code Ann. § 77-15-1 (1980) provides that "[n]o person who is incompetent to proceed shall be tried or punished for a public offense." According to Utah Code Ann. § 77-15-3 (1980), the chapter applies to any person charged with a public offense or serving a sentence of imprisonment. Utah Code Ann. § 77-15-5 (1980) allows the court to commit the individual "to the Utah state hospital, or to another facility for an evaluation not to exceed a period of 30 days based on examination, observation or treatment...." Upon a finding of incompe-

tence, the "court shall order him committed to the Utah state hospital...until the court which has committed him...finds that he is competent to proceed."

WYOMING, Wyo. Stat. § 7-13-901 (1987) provides that a convict under sentence of death lacks the "requisite mental capacity" if he lacks "the ability to understand the nature of death penalty and the reasons it was imposed." Wyo. Stat. § 7-13-902 (1987) provides that the court "shall stay the execution" of an incompetent death row inmate and order an examination. Subsection (f) of the statute provides that if the convict is found incompetent, the "judge shall suspend the execution...until a time when it is found that the convict has the requisite mental capacity."

APPENDIX G
FORMER DEATH PENALTY STATES
WHICH STAYED OR SUSPENDED EXECUTION
UNTIL COMPETENCY WAS REGAINED

KANSAS, Kan. Stat. Ann. § 22-4006 (1978) provided that the execution of an insane inmate shall be suspended "until further order" and "such proceedings may be had at such times as the district judge shall order until it is either determined that such convict is sane or incurably insane."

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 279, § 47 (repealed, 1957) provided that once a convict under sentence of death became insane, he was granted "a respite from execution" and the governor was authorized to order his removal "to the hospital...for care and treatment." The respite continued "until it is determined as herein provided that the convict is no longer insane." Mass. Gen. Laws Ann. ch. 279, § 62 (1983), provided the governor with the authority to "respite the execution" of an insane inmate "until it appears...that the prisoner is no longer insane. Upon such respite, the governor may order the removal of such prisoner to the hospital...." The governor could "further respite the execution of the sentence from time to time for a stated period, until it is determined that the prisoner is no longer insane, as herein provided." This capital punishment legislation was held unconstitutional under Article 12, Declaration of Rights of the Massachusetts State Constitution.

NEW YORK, N.Y. [Correct.] Law art. 22-B § 655 (repealed 1970) provided that an inmate under a sentence of death, once found to be insane, could be ordered removed "to a state hospital for insane convicts, there to remain until restored to his right mind, and it shall be the duty of the director of such hospital, whenever, in his opinion, said convict is cured of his insanity, to report the fact to a justice of the supreme court...which justice shall...cause him, the said convict, to be returned to the custody [sic] of the superintendent of the state institution whence he came, there to be dealt with according to law." N.Y. [Correct.] Law art. 22-B § 657 mandated that the governor, once the defendant was "cured of his insanity" or underwent a "restoration to sanity," to issue a warrant for the inmate's execution. New York's

death penalty statute mandating capital punishment for murders committed by inmates serving a life imprisonment sentence was held unconstitutional in 1984. See *People v. Smith*, 468 N.E. 2d 879 (N.Y. 1984).

APPENDIX H
DEATH PENALTY STATES
WHICH INVOLUNTARILY TREAT
CRIMINAL DEFENDANTS IN OTHER CONTEXTS

DELAWARE, Del. Code Ann. tit. 11, § 403 (1974) authorizes the court to commit a defendant found not guilty by reason of insanity to the Delaware State Hospital, subject to the court's approval, modification and periodic judicial evaluation of any specific treatment program. Del. Code Ann. tit. 11, § 404 (1974) authorizes the court to "order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial." Del. Code Ann. tit. 11, § 405 (1974) allows the court to order a prisoner who has become mentally ill after conviction but before sentencing "to be confined and treated in the Delaware State Hospital until he is capable of participating in the sentencing proceedings." Del. Code Ann. tit. 11, § 406 (1974) authorizes the Superior Court, after it appears that a prisoner has become mentally ill after conviction and sentence to order the prisoner transferred and confined in the Delaware State Hospital. Del. Code Ann. tit. 11, § 408 commits a defendant found guilty but mentally ill to the Department of Corrections where he "shall undergo further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated....[D]ecisions directly related to treatment for his mental illness shall be the joint responsibility of the Director of the Division of Alcoholism, Drug Abuse and Mental Health and those persons at the Delaware State Hospital who are directly responsible for such treatment." The statute further provides that "[t]he offender may, by written statement, refuse to take any drugs which are prescribed for treatment of his mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact." Del. Code Ann. tit. 11, § 409 authorizes the court to require psychological or psychiatric counseling and treatment as a condition of parole or probation, and failure to continue such treatment, except as the Department of Corrections may agree, is a grounds to revoke such release. The statute further provides that treatment is a condition of probation for any defendant found guilty but mentally ill.

INDIANA, Ind. Code § 35-36-2-5 (1983) provides that a defendant found guilty but mentally ill "shall be further evaluated and then treated in such a manner as is psychiatrically indicated for his mental illness. Treatment may be provided by: (1) the department of corrections; or (2) the department of mental health after transfer...." The statute provides further that "if a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may...require that he undergo treatment." Ind. Code § 35-36-3-1 (1986) authorizes the court, once it finds that the defendant lacks the ability to stand trial, to commit the defendant "to the department of mental health, to be confined by the department in the appropriate psychiatric institution." Ind. Code § 35-36-3-2 (1981) requires the superintendent of the department of mental health to certify the fact that the defendant has regained his capacity to stand trial, and the court shall "hold the trial as if no delay or postponement had occurred."

LOUISIANA, La. R.S. 28:53 (1989) and 28:55 (I) (1978), authorize involuntary treatment of inmates judicially committed; La.C.Cr.P. art. 648 (1988), art. 654 (1982), art. 657 (1987), La. R.S. 15:574.4 H (11) (1989), and La. R.S. 15:830.1 (1987), authorize involuntary treatment of pre-trial detainees, defendants found not guilty by reason of insanity, individuals released on probation or parole, and incarcerated prisoners respectively.

NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 651:11-a (1987) allows the court to conditionally release a criminal defendant subject to court-ordered treatment. Subd. IV (a) of that statute provides such condition may include "but [is] not limited to, a prescribed regimen of medical, psychiatric, or psychological care or treatment" with the court retaining authority to modify or eliminate conditions imposed. The statute further provides that the criminal defendant "as an explicit condition of release" must "comply with the conditions imposed by the court, including any prescribed regimen of...psychiatric...treatment" or else be subject to arrest.

NEW JERSEY, N.J. Rev. Stat. Ann. § 2C:4-4 (a) (1979) provides that "[n]o person who lacks the capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N. J. Rev. Stat. Ann. § 2C:4-6 (1979) further provides that an incompetent defendant may be either committed or released on an

outpatient basis until it is determined "whether it is substantially probable that the defendant could regain his competence within the foreseeable future." Once fitness is regained, proceedings against the defendant resume. The statute also provides for the conditional release or parole of a defendant. Persons acquitted by reason of insanity may be conditionally released, committed or transferred "to a less restrictive setting for treatment" as provided in N.J. Rev. Stat. Ann. § 2C:4-8 (1981) and 2C:4-9 (1979). New Jersey law also provides for the involuntary treatment of convicted sex offenders. N.J. Rev. Stat. Ann. § 2C:47-3 (a) (1979) states: "If the examination reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, the court may, upon the recommendation of the Adult Diagnostic and Treatment Center, sentence the offender to the Center for a program of specialized treatment for his mental condition...." The statute further provides in subdivision (c) that in lieu of incarceration the court may place the offender on probation with the condition that "he receive outpatient psychological treatment in a manner to be prescribed in each individual case." Because a significant number of inmates in state-owned or operated correctional facilities are mentally ill, New Jersey enacted N.J. Rev. Stat. Ann. § 30:4-82.1 (1986) requiring treatment of those inmates "either in the form of counseling or inpatient treatment during the period of their incarceration." Treatment under N.J. Rev. Stat. Ann. § 30:4-82.2 (1986) includes "treatment with prescription drugs." The statute requires a mental health treatment plan for each inmate including procedures to terminate the treatment when no longer necessary and a biennial review and revision of the plan.

OREGON, Or. Rev. Stat. § 426.490 (1979) states the policy and intent of the Oregon Legislative Assembly in that "the State of Oregon shall assist in improving the quality of life of chronically mentally ill persons within this state...." Or. Rev. Stat. § 426.670 (1979) provides authority to the state's mental health division, either separately or in conjunction with the state corrections division, "to receive, treat, study and retain in custody, as required, such sexually dangerous persons as are committed...." A sexually dangerous person is defined in Or. Rev. Stat. § 426.510 (1977) as "a person who because of repeated or compulsive acts of misconduct in sexual matters, or because of a mental disease or defect, is deemed likely to continue to perform such acts and be a danger to other persons." Or. Rev. Stat. § 426.675 (1979) authorizes the

court to order a convicted sex offender placed on probation "on the condition that the person participate in and successfully complete a treatment program for sexually dangerous persons" or to "impose a sentence of imprisonment with the order that the defendant...participate in a treatment program...." The statutory scheme presupposes that the treatment "will reduce the risk of future sexual offenses." Defendants found incompetent to proceed to trial under Or. Rev. Stat. § 161.370 (1975) may be committed "to the custody of the superintendent of a state mental hospital" or released "on supervision for so long as such unfitness shall endure." The statute authorizes the court to "place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health Division or a community mental health program for examination to determine if the defendant has regained his competency to stand trial." The statute further provides that proceedings will resume if capacity is achieved. Oregon has a Psychiatric Security Review Board created under Or. Rev. Stat. § 161.385 (1983) to supervise and require from the Mental Health Division a predischarge or preconditional release plan for those persons discharged or conditionally released to a state hospital for custody, care and treatment.

PENNSYLVANIA, Pa. Stat. Ann. tit. 50, § 7401 (1978) provides that "[w]hen a person who is charged with crime, or who is undergoing sentence, is or becomes severely mentally disabled, proceedings may be instituted for examination and treatment under the civil provisions of this act in the same manner as if he were not so charged or sentenced." Pa. Stat. Ann. tit. 50, § 7402 (1978) provides for the involuntary treatment of persons who are not severely mentally disabled but who were found incompetent to stand trial. The statute provides that the court may order involuntary treatment of such persons "not to exceed a specific period of 60 days" and "only if the court is reasonably certain that the involuntary treatment will provide the defendant with the capacity to stand trial. The court may order outpatient treatment, partial hospitalization or inpatient treatment." Subsection (d) of the statute authorizes the court to order a competency examination "at any stage in the proceedings." Pa. Stat. Ann. tit. 50, § 7403 (1978) provides that the proceedings shall be resumed if capacity to proceed is regained. Pa. Stat. Ann. tit. 50, § 7406 (1976) provides that an order directing involuntary treatment of a defendant found incompetent to stand trial, a defendant acquitted by reason of lack of responsibility, or

a defendant examined in aid of sentencing may be sought by the attorney for the commonwealth, the court, defense counsel, the defendant, the county administrator or any other interested party pursuant to Pa. Stat. Ann. tit. 50, § 7304 (1978). Subsections (b) and (c) of Pa. Stat. Ann. tit. 50, § 7304 (1978) outline the procedures for obtaining court-ordered involuntary treatment, requiring the petition to state there are "reasonable grounds to believe that the person is severely mentally disabled and in need of treatment." Subsection (a) requires proof of a "clear and present danger" proven by evidence of serious bodily harm to others, inability to care for himself, a danger of death or serious harm to himself, attempted suicide or self-mutilation. Pa. Stat. Ann. tit. 42, § 9727 (1982) provides that a defendant found guilty but mentally ill who is severely mentally disabled and in need of treatment be provided "such treatment as is psychiatrically or psychologically indicated for his mental illness." Subsection (d) of the statute further provides that before such a defendant is placed on prerelease or parole status, the court may require "[p]sychological and psychiatric counseling and treatment" as a condition of such status. The statute further provides that "[f]ailure to continue treatment, except by agreement of the supervising authority, shall be a basis for terminating prerelease status or instituting parole violation hearings." Subsection (f) of the statute further provides that the court may, either upon the district attorney's motion or the court's own initiative, "make treatment a condition of probation" for a guilty but mentally ill offender, and that "[f]ailure to continue treatment, including the refusal to take such drugs as may be prescribed, except by agreement of the sentencing court, shall be a basis for the institution of probation violation hearings."

SOUTH CAROLINA, S.C. Code Ann. § 44-23-430 (1977) permits the involuntary hospitalization of a defendant found incompetent to stand trial if he is "likely to become fit in the foreseeable future." If the defendant recovers, the court under S.C. Code Ann. § 44-23-460 (1977) has authority to order the criminal proceedings resumed. A person acquitted on grounds of insanity may be ordered hospitalized by the court pursuant to S.C. Code Ann. § 44-23-610 (1974). S.C. Code Ann. § 24-21-700 (1968) provides for commitment of prisoners who but for their psychiatric disabilities would be eligible for parole. The statute provides for the transfer of the prisoner "to a Veterans Administration Hospital which provides psychiatric care. When any prisoner paroled

for psychiatric treatment is determined to be in a suitable condition to be released, he shall not be returned to penal custody except for a subsequent violation of the conditions of his parole." S.C. Code Ann. § 17-24-70 (1988) provides that a defendant found guilty but mentally ill prior to incarceration "must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence." S.C. Code Ann. § 17-24-40 (1984) provides for the commitment of a defendant found not guilty by reason of insanity and permits the chief administrative judge under subsection (D) to impose any terms and conditions that are "therapeutic in nature, not punitive. Therapeutic terms shall include, but not be limited to, requirements that the defendant: (l) continue taking medication for an indefinite time and verify in writing the use of medication...."

TENNESSEE, Tenn. Code Ann. § 33-7-301 (1982) regulates the evaluation of a defendant believed incompetent to stand trial, and provides that "[i]f in the opinion of those performing the mental health evaluation, further evaluation and treatment is needed, the court may order the defendant hospitalized...for not more than thirty (30) days for the purpose of further evaluation and treatment as it relates to competency to stand trial." Subsection (b)(4) of the statute further provides that the "court shall determine...whether the defendant is substantially likely to injure himself or others if he is not treated in a forensic services unit and whether treatment is in his best interest" and subsection (b)(5) provides that upon such a finding, the defendant is transferred to the forensic services unit. Tenn. Code Ann. § 33-7-302 (1974) provides that the defendant must be delivered back to the sheriff once he "is restored to competence to stand trial." An offender found not guilty by reason of insanity may be ordered under Tenn. Code Ann. § 33-7-303 (1983) "to seek outpatient treatment and evaluation at a mental health facility, if the court determines that such treatment is required" or if the court finds that the offender is "substantially likely to injure himself or others if he is not treated in a forensic services unit...and treatment in such a unit is in his best interests."

TEXAS, Tex. Stat. Ann. art. 43.24 (1965) provides for treatment of the condemned, and provides that "[n]o torture, or ill treatment, or unnec-

essary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law." Tex. Stat. Ann. art. 46.01 (1967) provides that a defendant found mentally ill after conviction "may be hospitalized under the same procedures provided for other persons who are mentally ill." Tex. Stat. Ann. art. 46.02 (1989) governs a defendant found incompetent to stand trial, with the requirement that the written examination report of the defendant include "recommended treatment." The statute further provides "[i]f the examiner concludes that the defendant is incompetent to stand trial, the report shall include the examiner's observations and findings about whether there is a substantial probability that the defendant will attain the competence to stand trial in the foreseeable future." The statute also requires the examiner to submit a separate report on "whether the defendant is mentally ill and is likely to cause serious harm to himself or others or will, if not treated, continue to suffer severe and abnormal mental, emotional or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment...." Subsection 5 (a) of the same statute requires the court, if the defendant is found incompetent to stand trial on a felony charge and there is the possibility that the defendant will become competent, "shall enter an order committing the defendant...not to exceed 18 months" and an additional order provides for "further examination and treatment toward the specific objective of attaining competency to stand trial." Once competency is regained, subsection 8 (e) provides that proceedings on the criminal charges may be resumed. Tex. Stat. Ann. art. 46.3 (1989) provides the court with authority to commit an acquitted person meeting the criteria for involuntary commitment and to order "the acquitted person to participate in a prescribed regimen of medical, psychiatric, or psychological care or treatment on an out-patient basis" or if inappropriate, returned to the in-patient or residential facility. Failure to comply is reason to revoke the out-patient supervision status.

VERMONT, Vt. Stat. Ann. tit. 18, § 7611 (1977) provides that "[n]o person may be made subject to involuntary treatment unless he is found to be a person in need of treatment or a patient in need of further treatment." Vt. Stat. Ann. tit. 18, § 7101 (1977) defines "[a] patient in need of further treatment" as "[a] person in need of treatment" or "[a] patient who is receiving adequate treatment, and who, if such treatment is discontinued, presents a substantial probability that in the near fu-

ture his condition will deteriorate and he will become a person in need of treatment"; "[a] person in need of treatment" is "a person who is suffering from mental illness and, as a result of that mental illness, his capacity to exercise self-control, judgment, or discretion in the conduct of his affairs and social relations is so lessened that he poses a danger of harm to himself or others." Vt. Stat. Ann. tit. 13, § 4820 (1987) requires a commitment hearing for a criminal defendant claiming insanity as a defense, found incompetent to stand trial, not indicted by a grand jury because of insanity or is acquitted by reason of insanity "for the purpose of determining whether such person should be committed to the custody of the commissioner of mental health." Vt. Stat. Ann. tit. 13, § 4822 (1987) provides that "[i]f the court finds that such person is a person in need of treatment or a patient in need of further treatment...the court shall issue an order of commitment...which shall admit the person to the care and custody of the department of mental health for an indeterminate period." Subsection (b) of the statute further provides that the defendant is subject to the provisions of Title 18 including Vt. Stat. Ann. tit. 18, § 7611 (1977).

VIRGINIA, Va. Code § 19.2-177.1 (1988) provides for a determination of mental illness after sentencing. The statute provides for the transfer of a prisoner who is "mentally ill and imminently dangerous to himself or others...and requires treatment in a hospital rather than a local correctional facility and the person having custody arranges for an evaluation of the prisoner by a person skilled in the diagnosis and treatment of mental illness." The statute further authorizes a judge or magistrate "upon the advice of a person skilled in diagnosis and treatment of mental illness" to issue "a temporary order of detention for treatment." The statute further provides in subsection (2) that "[i]n no event shall the prisoner have the right to make application for voluntary admission and treatment as may be otherwise provided" and that after hospitalization, the prisoner is returned to serve the remainder of his sentence, if any. Va. Code § 19.2-180 (1975) requires the trial and sentencing of a prisoner once he is "restored to sanity...as if no delay had occurred on account of his insanity or feeble-mindedness." Va. Code § 19.2-169.1 (1985) governs the procedures regarding a defendant who is believed to be incompetent to stand trial or enter a plea. The statute provides in subsection (D) that the competency report should include "his need for treatment in the event he is found incompetent." Subsection (E) of the statute further provides that "[n]or shall

the fact that the defendant is under the influence of medication bar a finding of competency if the defendant is able to understand the charges against him and assist in his defense while medicated." Va. Code § 19.2-169.3 (1982) regulates the disposition of the unrestorable incompetent defendant and provides "[i]f the court finds the defendant is incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed."

WASHINGTON, Wash. Rev. Code § 10.77.050 (1974) provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Wash. Rev. Code § 10.77.020 (1974) provides that any court-ordered commitment or treatment of the criminally insane cannot exceed the maximum possible penal sentence for the crime charged. Wash. Rev. Code § 10.77.090 (1974) provides that once a defendant is found incompetent, all proceedings against him are stayed, and the court has authority to "commit the defendant to the custody of the secretary, who shall place such defendant in an appropriate facility of the department for evaluation and treatment...until he has regained competency necessary...but in no event, for no longer than a period of ninety days." Subsection (5) of the statute provides that "[a] defendant receiving medication for either physical or mental problems shall not be prohibited from standing trial, if the medication either enables him to understand the proceedings against him and to assist in his own defense, or does not disable him from so understanding and assisting in his own defense." Wash. Rev. Code § 10.77.110 (1974), § 10.77.120 (1974) and § 10.77.150 (1974) provide the court with authority to order treatment of criminal acquittees or conditional release of such persons "on such conditions as the court determines necessary."

APPENDIX I
NON-DEATH PENALTY JURISDICTIONS
WHICH INVOLUNTARILY TREAT
CRIMINAL DEFENDANTS IN OTHER CONTEXTS

ALASKA, Alaska Stat. § 12.47.050 (b) (1986) allows mandatory mental health treatment of defendant found guilty but mentally ill, with the Department of Corrections determining the course of treatment. Alaska Stat. § 12.47.055 (1984), allows the court to recommend or the Department of Corrections to provide "psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill." Alaska Stat. § 12.47.090 (1986) allows a defendant found not guilty by reason of insanity to be committed "for a period of time not to exceed the maximum term of imprisonment" for the crime charged or "until mental illness is cured or corrected." Alaska Stat. § 12.47.092 (1986) authorizes the conditional release of a defendant "subject to the conditions and requirements for treatment that the court may impose." Alaska Stat. § 12.47.110 (1982) authorizes a defendant found incompetent to be tried, convicted or sentenced to be committed to the custody of the commissioner of health and social services "for further evaluation and treatment until the defendant is mentally competent to stand trial, or until pending charges against the defendant are disposed of according to law."

DISTRICT OF COLUMBIA, D.C. Code Ann. § 24-301 (1973) authorizes a court finding "the accused to be then of unsound mind or mentally incompetent to stand trial or to participate in transfer proceedings" to be "confined to a hospital for the mentally ill." Furthermore, if the "accused person confined to a hospital for the mentally ill is restored to mental competency" a judicial determination of his competency to proceed will be made. D.C. Code Ann. § 24-301 further provides that a defendant acquitted on grounds of insanity is committed to a hospital for the mentally ill and once recovers, may be subject to unconditional release or conditionally released upon court supervision. "The court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital." D.C. Code Ann. § 24-302 (1973) provides that any person serving a sentence who becomes

mentally ill and is so certified by a psychiatrist, shall be transferred "to a hospital for the mentally ill to receive care and treatment during the continuance of his mental illness." D.C. Code Ann. § 24-303 (b) requires the superintendent of the hospital for the mentally ill to file a certification once the inmate has been "restored to mental health."

HAWAII, Hawaii Rev. Stat. § 706-607 (1972) provides that a court may involuntarily hospitalize a person "suffering from mental abnormality" after conviction in lieu of prosecution or sentencing. Hawaii Rev. Stat. § 704-403 (1972) provides that no person found incompetent to proceed shall be "tried, convicted or sentenced...as long as such incapacity endures." Once found incompetent, the court is authorized under Hawaii Rev. Stat. § 704-406 (1972) to suspend proceedings against the defendant and "commit him to the custody of the director of health to be placed in an appropriate institution for detention, care and treatment for so long as such unfitness shall endure." Once the defendant "has regained fitness to proceed," Hawaii Rev. Stat. § 704-406 (2) (1972) provides that "the penal proceeding shall be resumed." A defendant acquitted on the ground of physical or mental disease, disorder, or defect under Hawaii Rev. Stat. § 704-411 (a) (1983) may be committed to "the custody of the director of health to be placed in an appropriate institution for custody, care and treatment" if the defendant is a danger to himself, others or is "not a proper subject for conditional release." Subsection (b) of Hawaii Rev. Stat. § 704-411 (1983) further provides that such a defendant may be conditionally released if "he can be controlled adequately and given proper care, supervision and treatment." Hawaii Rev. Stat. § 704-413 (1983) mandates that the conditionally released defendant "shall continue to receive psychological or psychiatric treatment and care until discharged from conditional release. The person shall follow all prescribed treatments and take all prescribed medications according to the instructions of the person's treating mental health professional."

IOWA, Iowa Code § 812.4 (1983) provides that "if...the accused is found to be incapacitated...no further proceedings shall be taken...until the accused's capacity is restored." Iowa Code § 812.5 (1985) provides unless "there is substantial probability" that "the accused will regain capacity within a reasonable time" the state shall institute civil commitment proceedings. Iowa Code § 246.201 (1985) establishes the Iowa medical and classification center at Oakdale as "the forensic

hospital for persons displaying evidence of mental illness or psychosocial disorders and requiring diagnostic services or treatment in a security setting." Persons confined at the center include those found incompetent to stand trial and prisoners transferred for diagnosis, evaluation or treatment of mental illness. The statute further provides in subsection (5) that "[u]nless an inmate is determined to be mentally ill, the inmate shall not be subjected involuntarily to psychiatric treatment." Iowa Code § 246.503 (1985) requires that the transfer of mentally ill inmates be "in the best interests of the institution or inmates." Subsection (2) of this statute provides that "[w]hen the director has cause to believe that an inmate in a state correctional institution is mentally ill, the Iowa department of corrections may cause the inmate to be transferred to the Iowa medical and classification center for examination, diagnosis, or treatment. The inmate shall be confined at that institution or a state hospital for the mentally ill until the expiration of the inmate's sentence or until the inmate is pronounced in good mental health..." An inmate whose sentence has expired may as well be confined in the Iowa medical and classification center under subsection (3) of the statute if the director "has reason to believe" that the prisoner is mentally ill.

KANSAS, Kan. Stat. Ann. § 22-3303 (1977) provides that a defendant found incompetent to stand trial "shall be committed for evaluation and treatment to any appropriate state, county, or private institution for a period not to exceed ninety (90) days.... [T]he chief medical officer...shall certify...whether the defendant has a substantial probability of attaining competency to stand trial in the foreseeable future. If such probability does exist, the court shall order the defendant to remain in an appropriate...institution until the defendant attains competency to stand trial or for a period of six months..., whichever occurs first. If such probability does not exist..." involuntary commitment proceedings are commenced.

MAINE, Me. Rev. Stat. Ann. tit. 15, § 101-B (1987) provides that the court shall order a defendant "to be further examined by a psychiatrist and a clinical psychologist from the State Forensic Service if A. [i]t appears to the court, based on the report of any such examiner, that: (1) the defendant suffers or suffered from a mental disease or defect affecting his criminal responsibility or his competence for trial; or (2) [f]urther observation is required; or B. [t]he defendant enters or per-

sists in a plea of not criminally responsible by reason of insanity." Subsection (4) further provides that the court has the option to "[c]ommit the defendant to the custody of the Commissioner of Mental Health and Mental Retardation to be placed in an appropriate institution for the mentally ill or the mentally retarded for observation, care and treatment" which cannot exceed one year in duration. "If the court determines that the defendant is not competent to stand trial but there does exist a substantial probability that the defendant will be competent to stand trial in the foreseeable future, it shall recommit the defendant." Otherwise, civil commitment procedures are instituted. The statute further provides the court with authority to order the defendant released on bail "with or without the further order that the defendant undergo...treatment when it is deemed appropriate by the head of the hospital or clinic or by the private psychiatrist." Me. Rev. Stat. Ann. tit. 15, § 103 (1963) provides that a person acquitted by reason of mental disease or mental defect shall be "committed to the custody of the Commissioner of Mental Health and Corrections to be placed in the appropriate institution for the mentally ill or the mentally retarded for care and treatment." Me. Rev. Stat. Ann. tit. 15, § 104-A (1985) provides for court-ordered treatment as a condition for modified release treatment.

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 123, § 15 (1987) provides in subsection (d) that "[i]f the defendant is found incompetent to stand trial, trial of the case shall be stayed until such time as the defendant becomes competent to stand trial, unless the case is dismissed." Subsection (e) of the statute further authorizes that the court may "in its discretion commit the person to a facility or the Bridgewater state hospital" for up to six months if that person is found guilty on a criminal charge and prior to sentencing, the court orders psychiatric examination and observation. Court-ordered hospitalization and commitment with various time limits for defendants found incompetent to stand trial or not guilty by reason of mental illness are also authorized under Mass. Gen. Laws Ann. ch. 123, § 16 (1987). Once competency for trial is regained, the court-order commitment is terminated and the defendant is returned for trial. See Mass. Gen. Laws Ann. ch. 123, § 17 (a) (1987). Mass. Gen. Laws Ann. ch. 123, § 18 (1987) allows for the court-ordered transfer of prisoners in need of hospitalization by reason of mental illness and further provides "the prisoner shall be confined at said hospital if the findings required for commitment to a

facility are made and if the commissioner of corrections certifies to the court that confinement of the prisoner at said hospital is necessary to insure his continued retention in custody." Chemical restraints of mentally ill individuals in an emergency when a designated physician is not present is further authorized in Mass. Gen. Laws Ann. ch. 123, § 21 (1987) and may be "issued by a designated physician who has determined, after telephone consultation with a physician, registered nurse or certified physician assistant who is present at the time and site of the emergency and who has personally examined the patient, that such chemical restraint is the least restrictive, most appropriate alternative available; provided, however, that the medication so ordered has been previously authorized as part of the individual's current treatment plan."

MICHIGAN, Mich. Stat. Ann. § 330.2003 (c) (1979) provides that the department of mental health "shall provide psychiatric in-patient services for a prisoner...until it is determined by the director...that the prisoner can no longer benefit from treatment in the program." Mich. Stat. Ann. § 330.2003a (1975) provides that "[u]nless ordered by the probate court, a prisoner shall not be transferred to the center for forensic psychiatry program without having been informed of possible treatment methods and without having provided written consent to transfer and treatment." Mich. Stat. Ann. § 330.2003b (e) (1979) further provides that "[i]f a psychiatrist for the department of corrections determines that a prisoner is mentally ill or mentally retarded and that involuntary transfer to the department of mental health is warranted, the department of mental health shall select a psychiatrist to examine the prisoner. If the psychiatrist...concurs...that the prisoner is mentally ill or mentally retarded and requires intensive or specialized care or psychiatric inpatient services, a hearing shall be held...." Mich. Rev. Stat. Ann. § 330.2005d (1979) provides that (l) "[i]f the court finds that the prisoner is mentally ill or mentally retarded, the court shall enter a finding to that effect and shall order that the prisoner be transferred for treatment to the center for forensic psychiatry program." Mich. Rev. Stat. Ann. § 330.2020 (1975) provides that "a defendant shall not be determined incompetent to stand trial because psychotropic drugs or other medication have been or are being administered under proper medical direction, and even though without such medication the defendant might be incompetent to stand trial." Mich. Rev. Stat. Ann. § 330.2028 (1975) requires once a defendant is found incompetent to

stand trial, the center's report shall contain "the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment...." Mich. Rev. Stat. Ann. § 330.2030 (1975) further provides in subsection (2) that "[i]f the defendant is determined incompetent to stand trial, the court shall also determine whether there is a substantial probability that the defendant, if provided a course of treatment, will attain competence to stand trial...." Subsection (4) of the statute further provides that "[i]f the defendant is receiving medication and is not determined incompetent to stand trial, the court may, in order to maintain the competence of the defendant to stand trial, make such orders as it deems appropriate for the continued administration of such medication pending and during trial." Mich. Rev. Stat. Ann. § 330.2032 (1975) provides that "(1) [i]f the defendant is determined incompetent to stand trial, and if the court determines that there is a substantial probability that, if provided a course of treatment, he will attain competency to stand trial..., the court shall order him to undergo treatment to render him competent to stand trial." Subsection (3) of that statute further authorizes the court to "commit the defendant to the custody of the department of mental health...only if commitment is necessary for the effective administration of the course of treatment." Court-ordered treatment is limited in Mich. Rev. Stat. Ann. § 330.2034 (1975) to no more than 15 months or one-third the maximum sentence the defendant could receive if convicted, whichever is lesser.

MINNESOTA, Minn. Stat. Ann. § 611.026 (1986) provides that "[n]o person shall be tried, sentenced or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense...." Minn. Stat. Ann. § 241.69, Subd. 1. (1987), mandates the establishment of a psychiatric unit at one of the adult correctional institutions for the "care and treatment of those inmates of state correctional institutions who become mentally ill." The statute further provides in Subd. 4. that "[i]f the examining physician or psychologist finds the person to be mentally ill and in need of long term care in a hospital, or if an inmate transferred [on the recommendation of an examining physician or psychologist in Subd. 3] refuses to voluntarily participate in the treatment program at the psychiatric unit, the chief executive officer of the institution or other person in charge shall initiate proceedings for judicial commitment....A person confined in a state correctional institution for adults who has been

adjudicated to be mentally ill and in need of treatment may be committed to the commissioner of corrections and placed in the psychiatric unit." Minn. Stat. Ann. § 241.67, Subd. 1. (2) (1989) authorizes the court to require treatment of convicted sex offenders as a condition of probation. As to persons believed to be incompetent to stand trial, Minn. Stat. Ann. § 253.25 (1985) authorizes the court to commit the defendant "for safe-keeping and treatment and such person shall be received and cared for thereat until he shall recover when he shall be returned to the court from which he was received there to be dealt with according to law." Furthermore, Minn. Stat. Ann. § 253.26 (1985) authorizes the transfer of patients who "have homicidal tendencies or to be under sentence or indictment or information" to the Minnesota Security Hospital "for safe-keeping and treatment." Minn. Stat. Ann. § 254.04 (1987) and § 254.09 (1986) allow for court-ordered treatment of inebriates and habitual narcotic users, respectively.

NEW YORK, N.Y. [Crim.Pro.] Law Ch. 11A, § 730.10 et. seq. (1976) governs mental disease or defect excluding fitness to proceed. The statutory scheme gives the court discretion to hospitalize a criminal defendant until a mental examination is completed. Furthermore, subsection 4 of the N.Y. [Crim.Pro.] Law Ch. 11A, § 730.20 (1972) provides that "[d]uring the period of hospital confinement, the physician in charge of the hospital may administer or cause to be administered to the defendant such emergency psychiatric, medical, or other therapeutic treatment as in his judgment should be administered." An incompetent defendant may be committed under N.Y. [Crim.Pro.] Law Ch. 11A, § 730.40 (1970) "for care and treatment in an appropriate institution for a period not to exceed ninety days." N.Y. [Crim.Pro.] Law Ch. 11A, § 730.50 (1974) authorizes criminal proceedings to resume once the defendant is certified as competent to proceed. Subsection 1 of the statute further provides that a defendant indicted for or convicted of a felony if incompetent is committed "for care and treatment in an appropriate institution for a period not to exceed one year."

NORTH DAKOTA, N.D. Cent. Code § 12.1-05-05 (1989) provides that "the use of force" by a person "with parental, custodial, or similar responsibilities" upon another person is justified. Furthermore, a person who is "a duly licensed physician, or a person acting at his direction, may use force in order to administer a recognized form of treatment to promote the physical or mental health of a patient if the treatment is

administered:...(c) [b]y order of a court of competent jurisdiction." N.D. Cent. Code § 12.1-04-04 (1973) provides that "[n]o person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N.D. Cent. Code § 12.1-04-08 (1973) provides that proceedings against an incompetent defendant shall be suspended and "the court shall commit him to the custody of the superintendent of the state hospital or the state school. However, the defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain fitness to proceed in the foreseeable future. Continued commitment of the defendant must be justified by progress toward fitness to proceed....When the court determines...that the defendant has regained fitness to proceed, the proceeding shall be resumed." N.D. Cent. Code § 12.1-04.1-21 (1985) provides that following a verdict of not guilty by reason of lack of criminal responsibility, the court "shall order the individual committed to a treatment facility...for examination." N.D. Cent. Code § 12.1-04.1-22 (4)(b) (1985) provides that if the court should find the acquittee "is mentally ill or defective and there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act of violence threatening another with bodily injury or inflicting property damage and that the individual is not a proper subject for conditional release, it shall order the individual committed to a treatment facility for custody and treatment. If the court finds that the risk that the individual will commit an act of violence...will be controlled adequately with supervision and treatment if the individual is conditionally released and that the necessary supervision and treatment are available, it shall order the person released subject to conditions it considers appropriate for the protection of society." Subsection (4)(c) of the statute provides that "[i]f the court finds that the individual is mentally ill or defective and that there is a substantial risk, as a result of mental illness or defect, that the individual will commit a criminal act not included in subdivision b, it shall order the individual to report to a treatment facility for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the treatment facility." N.D. Cent. Code § 12.1-04.1-24 (1985) provides the court with similar authority to require a mentally ill or defective per-

son with a substantial risk of committing a nonviolent criminal act to submit to "noncustodial evaluation and treatment."

RHODE ISLAND, R.I. Gen. Laws § 40.1-5.3-6 (1989) provides for the examination "of any person awaiting trial or convicted of a crime and imprisoned" if that person is believed to be "mentally ill and requires specialized mental health care and psychiatric in-patient services which cannot be provided in a correctional facility." The court under R.I. Gen. Laws § 40.1-5.3-7 (1989) may order the defendant's transfer and R.I. Gen. Laws § 40.1-5.3-9 (1989) requires the inmate's return to confinement once he has "sufficiently recovered." R.I. Gen. Laws § 40.1-5.3-13 (1989) provides the inmate with general rights to care and treatment but further provides that "[t]he exercise of these rights may be limited only for good cause and any limitation must be promptly entered into the person's record." Subsection (g) of the statute also indicates that "substituted judgment" is used for an incompetent individual. R.I. Gen. Laws § 40.1-5.3-1 (1982) establishes a state facility for the "proper care, treatment and restraint" of individuals found incompetent to stand trial and criminally insane persons. R.I. Gen. Laws § 40.1-5.3-3 (1984) provides the court with authority to commit a defendant found incompetent to stand trial "to the custody of the director for care and treatment in an appropriate public or private facility or to the care and custody of a guardian." The statute further provides that "[i]f the court finds that the defendant is incompetent and that a reasonable likelihood exists that he will become competent...it shall order continuation of the commitment...." R.I. Gen. Laws § 40.1-5.3-4 (1984) permits a court to commit a person acquitted on the ground of insanity and believed to be dangerous "for care and treatment as an inpatient in a public institution."

WEST VIRGINIA, W. Va. Code § 27-6A-2 (1979) provides that a defendant found incompetent to stand trial with a "substantial likelihood that the individual will attain competency" may be committed to a mental health facility "for an improvement period not to exceed six months." W. Va. Code § 28-5-31 (1980) provides for the treatment of mentally diseased inmates who are "deemed to be an appropriate candidate for parole, but for a condition warranting involuntary hospitalization." The statute further provides for the transfer of a mentally ill convict in a jail, prison or other facility who is in need of treatment. Before such a transfer, the statute requires a hearing and a court finding

that the inmate is mentally ill, mentally retarded or addicted, is likely to cause harm to himself or others, that requisite treatment or training is not available at the correctional center, and that the designated facility could provide such treatment "as the court finds appropriate."

WISCONSIN, Wis. Stat. § 971.13 (1982) provides an incompetent defendant may not be "tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." In subsection (2) the statute further provides that "[a] defendant shall not be determined incompetent to proceed solely because medication has been or is being administered to restore or maintain competency." Wis. Stat. § 971.14 (f) (1987) provides the defendant ordered to undergo a competency examination with a right to review "voluntary treatment appropriate to his or her medical needs. The defendant may refuse medication and treatment, except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others." Subdivision (5) (a) of the statute further provides the court with authority to order an incompetent defendant committed for up to 18 months if the defendant is "likely to become competent...if provided with appropriate treatment." Subdivision (5) (d) further provides "[i]f the defendant is receiving medication, the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." Wis. Stat. § 971.17 (1970) gives the court authority to order a defendant found not guilty because of mental disease or defect "to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged." Wis. Stat. § 51.20 (1) (ar) (1987) governs the involuntary commitment for treatment of inmates in a state prison. The statute requires the state to allege that the inmate "is mentally ill, is a proper subject for treatment and is in need of treatment." The petition must also contain evidence that "appropriate less restrictive forms of treatment have been attempted with the individual and have been unsuccessful and it shall include a description of the less restrictive forms of treatment that were attempted. The petition shall also allege that the individual has been fully informed about his or her treatment needs, the mental health services available to him or her and his or her rights with a licensed physician or a licensed psychologist." Subsection (7) (d) of the statute further provides that "[t]he court may order psychotropic medication as a temporary protective service...if it finds that there is probable cause to

believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for and participate in subsequent legal proceedings. An individual is not competent to refuse psychotropic medication if, because of chronic mental illness, the individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment, and the alternatives to accepting the particular treatment offered, after the advantages, disadvantages and alternatives have been explained to the individual." Subsection (8) of the statute further provides that "[t]he right to receive treatment voluntarily or accept treatment as a condition of release ...does not apply to an individual for whom a probable cause finding has been made...that he or she is not competent to refuse medication, to the extent that the treatment includes medication." Subsection (13) (a) (4m) (dm) further provides that "[i]f the court finds that the dangerousness of the subject individual is likely to be controlled with appropriate medication administered on an outpatient basis, the court may direct in its order of commitment that the county department...release the individual...with one of the conditions being that the individual shall take medication as prescribed by a physician, subject to the individual's right to refuse medication....The court order may direct that...if...the individual has failed to take the medication as prescribed...the director...may request that the individual be taken into custody...and that medication, as prescribed by the physician, may be administered voluntarily or against his will of the individual under s. 51.61(1) (g) and (h)." Wis. Stat. § 51.61 (1) (g) 1. (1987) provides mental health patients with the "right to refuse all medication and treatment except as ordered by the court under subd. 2, or in a situation in which medication or treatment is necessary to prevent serious physical harm to the patient or to others." Subdivision 2 further provides that "the court shall hold a hearing to determine whether there is probable cause to believe that the individual is not competent to refuse medication and whether the medication will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for or participate in subsequent legal proceedings." If the court determines that such medication is appropriate and the individual is incompetent, "the court shall issue an order permitting medication to be administered to the individual regardless of his or her consent." Subdivision (6) of the statute further provides that

the county departments "have the right to use customary and usual treatment techniques and procedures in a reasonable and appropriate manner in the treatment of patients...for the purpose of ameliorating the conditions for which the patients were admitted to the system."

APPENDIX J

STATES WHICH STATUTORILY PROVIDE THAT COMPETENCY TO STAND TRIAL MAY BE ACHIEVED THROUGH TREATMENT

ALASKA, Alaska Stat. § 12.47.110 (d) (1982).

COLORADO, Colo. Rev. Stat. § 16-8-105 (1963) and § 16-8-114 (1963).

DELAWARE, Del. Code Ann. tit. 11, § 404 (1953).

FLORIDA, Fla. Rule of Crim. Pro. 3.215 (c) (1989), psychotropic medication permissible to achieve and maintain competency to proceed generally at any "material stage of a criminal proceeding..."

KANSAS, Kan. Stat. Ann. § 22-3303 (1977).

LOUISIANA, La.C.Cr.P. art. 648 (1988).

PENNSYLVANIA, Pa. Stat. Ann. tit. 50, § 7402 (1978).

MAINE, Me. Rev. Stat. Ann. tit. 15, § 101-B (4) (1987).

MICHIGAN, Mich. Rev. Stat. Ann. § 330.2020 (1975).

MINNESOTA, Minn. Stat. Ann. § 253.25 (1957).

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1002 (b) (2) (1989).

NORTH DAKOTA, N.D. Cent. Code § 12.1-04-08 (1973).

RHODE ISLAND, R.I. Gen. Laws § 40.1-5.3-3 (1984).

TENNESSEE, Tenn. Code Ann. § 33-7-301 (1982).

TEXAS, Texas Stat. Ann. art. 46.02 (5) (a) (1989).

UTAH, Utah Code Ann. § 77-15-5 (1980).

VIRGINIA, Va. Code § 19.2-169.1 (E) (1985).

WASHINGTON, Wash. Rev. Code § 10.77.090 (5) (1974).

WEST VIRGINIA, W. Va. Code § 27-6A-2 (1979).

WISCONSIN, Wis. Stat. § 971.13 (2) (1982).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHAEL OWEN PERRY,
v. *Petitioner,*
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Louisiana

BRIEF FOR THE
AMERICAN PSYCHIATRIC ASSOCIATION AND THE
AMERICAN MEDICAL ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the question whether the state court order directing that petitioner be involuntarily medicated for the purpose of restoring his competence to be executed is consistent with the Due Process Clause of the Fourteenth Amendment.

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**BRIEF FOR THE
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AMICI CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF AMICI CURIAE

Founded in 1844, the American Psychiatric Association (APA) is the Nation's largest organization of physicians specializing in psychiatry. Approximately 35,000 of the Nation's psychiatrists are members. The APA has participated as *amicus curiae* in numerous cases involving mental health issues, including *Washington v. Harper*, 110 S. Ct. 1028 (1990), and *Ford v. Wainwright*, 477 U.S. 399 (1986). Because psychiatrists have the primary responsibility for providing psychiatric treatment, including prescribing and administering antipsychotic medication, to prisoners on death row, the order compelling such medication in this case greatly affects the concerns and work of the APA and its members. The

APA believes that its clinical experience, its scientific knowledge of psychiatric disorders and their treatment, and its work in psychiatric ethics can assist the Court in resolving the issues presented. Several of the APA's ethical principles, including the bar on psychiatrists' participation in an execution, are implicated by this case.

The American Medical Association (AMA) is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students. The AMA has filed numerous briefs in this Court in cases, such as this one, that raise serious issues of public health or medical ethics. One of the AMA's ethical opinions, Opinion 2.06, which precludes a physician from participating in a legally authorized execution, is directly relevant to the matter before the Court.¹

STATEMENT

Petitioner Michael Perry, who has a long history of mental illness, suffers from schizoaffective disorder. Pet. App. 79, 133-34.² His symptoms include auditory hallucinations, paranoid thoughts, and disordered, delusional, and inconsistent thinking. *Id.* at 70, 77, 84. In the past, Perry has received psychotropic drugs, including haloperidol (otherwise known by its trade name, Haldol), as treatment for his illness. *Id.* at 50, 53.³

¹ The parties have consented to the filing of this brief. Copies of their letters have been lodged with the Clerk.

² Schizoaffective disorder is characterized by the symptoms of both schizophrenia (e.g., delusions, hallucinations, loosening of associations) and mood disorders (depressive or manic episodes). APA, *Diagnostic and Statistical Manual of Mental Disorders* 194, 208-10 (3d rev. ed. 1987).

³ The terms "antipsychotic," "neuroleptic," and "psychotropic" are commonly used interchangeably to refer to medication used to treat thought disorders such as Perry's. See *Washington v. Harper*, 110 S. Ct. at 1032; R. Baldessarini, *Chemotherapy in Psychiatry*,

Not surprisingly, Perry's mental condition was an issue throughout the criminal proceedings against him. Initially, two sanity commissions were convened to determine Perry's competence to stand trial. *State v. Perry*, 502 So.2d 543, 547 (La. 1986), *cert. denied*, 484 U.S. 872 (1987). The first commission, composed of two physicians and convened several months after Perry's arrest, recommended that he be transferred to a state facility for a complete psychiatric evaluation and for treatment. *Id.* at 547-48. The trial court accepted the recommendation. Eighteen months later, a second sanity commission, composed of three physicians, decided that Perry had become competent to stand trial. *Id.* at 548. Thereafter, although Perry had earlier entered a dual plea of not guilty and not guilty by reason of insanity to all five charges against him, he was permitted by the trial court, against the advice of counsel, to withdraw his dual plea and enter a simple plea of not guilty. *Id.* at 547, 550.

In 1985, Perry was convicted on five counts of murder and sentenced to death. The Supreme Court of Louisiana affirmed the conviction and sentence. *State v. Perry*, *supra*. Although the court rejected Perry's claims that he had not been competent either to stand trial or to withdraw his insanity plea, the Louisiana Supreme Court nonetheless suggested that a review of Perry's sanity prior to execution "might be in order." 502 So.2d at 564.⁴ Accordingly, on January 21, 1988, the trial court

ch. 2 (rev. ed. 1985). Other medications, such as antidepressants and lithium, treat mood rather than thought disorders. R. Baldessarini, *supra*, at ch. 3-4. Haldol, a tranquilizer and neuroleptic, is widely used by psychiatrists to manage the symptoms of thought disorders. See *Physician's Desk Reference* 1282-86 (44th ed. 1990).

⁴ The court noted that Perry's counsel "may apply to the trial court for appointment of a sanity commission to make such a determination" and that the prosecutor or judge could *sua sponte* raise the issue of mental incompetence to be executed. 502 So.2d at 564.

appointed a sanity commission, composed of three psychiatrists and a clinical psychologist, to investigate Perry's "present sanity." Pet. App. 25; Pet. 5.

During the next nine months, the trial court held four separate hearings. At those hearings, the court received testimony and reports from commission members, Perry's medical records, and Perry's own videotaped testimony. Pet. 5, 7. Between April 20 and August 26, the trial court also received weekly reports on Perry's mental condition from the Louisiana Department of Public Safety and Corrections. Pet. 6.⁵

On October 21, 1988, the trial court issued its ruling. The court adopted the test for incompetence to be executed that Justice Powell articulated in *Ford v. Wainwright*. Pet. App. 50. See 477 U.S. at 422 (Powell, J., concurring in part and concurring in the result) (inmates are incompetent to be executed if they are "unaware of the punishment they are about to suffer and why they are to suffer it"). Applying that standard, the court found that Perry was "competent for execution . . . [but] only while maintained on psychotropic medication in the form of Haldol." Pet. App. 54. Although the court acknowledged that Perry had some right to refuse psychotropic medication (*id.* at 47), it concluded, without analysis, that "Louisiana's interest in the execution of [the] jury's verdict override[s] those rights of Mr. Perry" (*id.* at 56). Based on that conclusion, the court stated: "defendant's competency is achieved through the use of antitropic [*sic*] or antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the de-

⁵ On August 26, the trial court issued an order requiring, among other things, that Louisiana prison authorities provide Perry with "psychiatric treatment and medication as deemed appropriate by the medical staff" until September 25. Pet. App. 30. Perry obtained a stay of the order of forcible medication from the Louisiana Supreme Court. *Ibid.*

fendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection." *Id.* at 62.

The trial court stayed its order until the Louisiana Supreme Court could rule on any appeal. The Louisiana Supreme Court summarily declined to hear Perry's challenge. *State v. Perry*, 543 So.2d 487, *reh'g denied*, 545 So.2d 1049 (1989). The stay of the medication order is still in effect. Pet. 7.

SUMMARY OF ARGUMENT

The trial court's order, requiring petitioner to be medicated involuntarily for the sole purpose of restoring him to competence, violates the Due Process Clause of the Fourteenth Amendment. As this Court held in *Washington v. Harper*, 110 S. Ct. 1028 (1990), the substantive component of that clause protects a prisoner's liberty interest in avoiding unwanted psychotropic medication. In our view, a State cannot justify invasion of that interest when contrary to the prisoner's medical interests. At a minimum, however, the Due Process Clause must preclude a State from administering involuntary medication when it is *not only* contrary to the patient's medical interests *but also* unnecessary to treat a condition that poses a danger to others. This Court's decisions, lower court decisions, state statutes, and the vital state interest in preserving the ethical integrity and proper functioning of the medical profession uniformly attest to the insufficiency of any state interest in ordering psychotropic medication where, as here, neither a *parens patriae* nor a dangerousness justification is present.

Once it is recognized that the State cannot administer psychotropic drugs against an incompetent prisoner's will, and therefore cannot execute him (*Ford v. Wainwright*, 477 U.S. 399 (1986)), it is clear that neither can the State allow the prisoner to languish in a per-

manent psychotic state without running afoul of the Constitution. Any such indifference would violate the prisoner's Eighth Amendment right to needed medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). No state interest in waiting indefinitely for a possible natural restoration of competence (which is speculative) or in deterring feigned incompetence (which is not present here, and is generally detectable) can justify the State's denial of the constitutionally required treatment. Instead, the State must commute petitioner's sentence to life imprisonment and provide him with treatment.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS A STATE FROM FORCIBLY MEDICATING A PRISONER SOLELY FOR THE PURPOSE OF RESTORING HIM TO COMPETENCE SO THAT HE MAY BE EXECUTED

The legal standards governing substantive due process analysis are settled. This Court traditionally has engaged in a balancing process, weighing "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). The inquiry involves two steps: "a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Washington v. Harper*, 110 S. Ct. at 1036 (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)) (citations omitted). Under those standards, the trial court's order cannot stand, for the State has no adequate interest to justify overriding Perry's liberty interest in refusing psychotropic medication.⁶

⁶ This brief relies on a due process analysis and does not address any distinct Eighth Amendment challenge to the involuntary medication order. We note, however, that in contrast to the State's

A. Petitioner has a Substantial Liberty Interest in Avoiding the Unwanted Administration of Psychotropic Drugs

In *Washington v. Harper*, this Court held that a prison inmate possesses a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." 110 S. Ct. at 1036; see also *Mills v. Rogers*, 457 U.S. at 299 n.16 (assuming existence of liberty interest); *Vitek v. Jones*, 445 U.S. 480, 493 (1980). That interest is founded on the nature of the proposed invasion as well as the individual's legitimate claim to safeguard his dignity and bodily integrity. Those factors are of heightened significance, of course, and the liberty interest in avoiding the nonconsensual injection of Haldol is especially great, when the injection sets the prisoner directly on the road to execution.⁷

Contrary to Louisiana's contention (Br. in Opp. 10), the fact that execution has been authorized through criminal proceedings does not suffice to justify the independent physical invasion of medication or to extinguish Perry's liberty interest in avoiding involuntary psychotropic medication. It is axiomatic that conviction of a crime and incarceration, while limiting an inmate's right to freedom from confinement, do not extinguish his right

argument—"the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out" (Br. in Opp. 4)—this case can readily be viewed as involving an indirect means by which a punishment *prohibited* by the Eighth Amendment (execution of the incompetent) may be carried out.

⁷ Perry's liberty interest is not diminished by the fact that he is incompetent to give or refuse informed consent to medical treatment. An absence of consent may have the same legal consequence whether it is the result of a competent person's refusal or an incompetent person's inability to consent. Cf. *Zinermon v. Burch*, 110 S. Ct. 975 (1990). In any event, it is difficult to conceive that any guardian, under a "substituted judgment" or "best interests" standard, would consent to medication that would lead to death.

to liberty altogether. *Vitek v. Jones*, 445 U.S. at 493-94; *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); see also *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006 n.8 (1989). In *Harper* and elsewhere, this Court has applied that principle in the specific context of involuntary medical treatment of prisoners. See *Vitek v. Jones*, 445 U.S. at 491-94; see also *Youngberg v. Romeo*, 457 U.S. at 315-16. Here, involuntary medication has not been authorized as part of Perry's criminal sentence, and it is not "among those [deprivations] generally authorized by his confinement." *DeShaney*, 109 S. Ct. at 1006 n.8; see also *Vitek v. Jones*, 445 U.S. at 493 (medical confinement is "qualitatively different from the punishment characteristically suffered by a person convicted of crime"). Consequently, Perry retains an independent liberty interest in avoiding involuntary administration of psychotropic medication—an interest not extinguished by criminal conviction and sentence, and protected unless overcome by a sufficient state interest."

B. The State does not have a Sufficient Interest to Override Petitioner's Liberty Interest

Before this Court, Louisiana has suggested that the order overriding petitioner's substantial liberty interest is justified by (a) a *parens patriae* interest in furthering Perry's medical interests (Br. in Opp. 4, 14-15), (b) a police power interest in protecting others against dangers caused by Perry's incompetence (*id.* at 14), and (c) a penal interest in carrying out Perry's sentence. There is, however, no basis for either a *parens patriae* or dangerousness justification in this case. The order requiring administration of Haldol must stand, if at all, on the ground that it facilitates Perry's execution. But that in-

* State law recognizes a liberty interest that is at least as extensive as that protected by the Due Process Clause. See La. Rev. Stat. Ann. § 15:830.1 (West 1981).

terest is insufficient to justify the deprivation of Perry's liberty interest that Louisiana proposes.

1. The Medication Order is Based Only on the State's Interest in Facilitating Capital Punishment

Although the court below did not rely on a *parens patriae* rationale, the State here invokes such a rationale to justify medicating Perry involuntarily. Pet. App. 56; Br. in Opp. 14-15. According to the State, "the medicine is in . . . Perry's . . . best interest." Br. in Opp. 4. That remarkable claim is obviously incorrect.

Under its *parens patriae* power, a State may act to preserve and promote the welfare of those who cannot care for themselves. See *Schall v. Martin*, 467 U.S. 253, 265-66 (1984); *O'Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975); *id.* at 583 (Burger, C.J., concurring).⁹ As this Court observed a century ago, the *parens patriae* power is by nature "a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890); see also *Addington v. Texas*, 441 U.S. 418, 426 (1979). It strains credulity to invoke the *parens patriae* power in this case. Louisiana's efforts are aimed

⁹ The term *parens patriae*, meaning "father of the country," was inherited from the English common law and traditionally referred to the King's power to act as "the general guardian of all infants, idiots, and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, *Commentaries* *47). The King's *parens patriae* power generally was employed for the benefit of those who could not care for themselves. *Ibid.* This concept has been expanded in the United States. For example, in the anti-trust area, courts have held that the State may bring a *parens patriae* suit to vindicate certain "quasi-sovereign" interests. *Id.* at 257-60. Even in its expanded version, however, the power is aimed at benefiting the persons represented by the State.

not at benefiting Perry as a ward of the State, but rather at facilitating his death to serve separate state interests. Any benefit that Haldol might confer on Perry¹⁰ would be both fleeting and purchased at the cost of his life.¹¹

Administration of psychotropic medication is thus directly contrary to Perry's medical interests. To be sure, as the APA has explained in detail in prior briefs before this Court, psychotropic medication is, properly used, a very effective form of treatment for both acute and chronic forms of psychosis. See Brief of Am. Psychiatric Ass'n As Amicus Curiae in *Washington v. Harper*, at 10-16. The Court in *Harper* specifically recognized the therapeutic benefits of such medication. 110 S. Ct. at 1041. Whether a particular treatment is in a particular patient's medical interests, however, is always a question involving consideration of benefits and risks. There may well be room for debate about that balance in other situations—as where the patient is not under any sentence of death,¹² or where the inmate is currently competent

¹⁰ The trial court found that Haldol improved Perry's mental functioning. Pet. App. 51, 54, 57.

¹¹ Conceivably, Perry might have his death sentence overturned on other grounds on collateral review. Because the sentence has been affirmed on appeal, however, such a possibility must, for present purposes, be deemed highly speculative. See *Whitmore v. Arkansas*, No. 88-7146, slip op. at 7 (U.S. Apr. 24, 1990). Similarly, in light of the trial court's finding that Haldol restores Perry to competence to be executed (Pet. App. 54, 57), this Court must take it as given that administration of Haldol would lead to competence for purposes of *Ford v. Wainwright*, and hence to execution.

¹² Most important in this regard are the cases discussing involuntary medication of persons found incompetent to stand trial. See, e.g., *United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied, 110 S. Ct. 1317 (1990); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985). In that situation, even when the defendant is charged with a capital offense, on one side of the balance are the benefits of medication (which may be vital to the defendant's ability to assist in his de-

and, while treatable disorders might be present, any descent into incompetence is speculative.¹³ But where, as here, the patient is sentenced to death and medication would all but inexorably lead to execution, the balance determining the patient's medical interests is unmistakably clear. There can be no *parens patriae* justification for facilitating an incompetent person's death.

Like the *parens patriae* claim, the State's attempt to rely on a dangerousness rationale here is misplaced. This case plainly does not implicate the State's interest in exercising its police power to correct a condition that poses an immediate danger to other inmates or staff in the prison setting. Although the State asserts the contrary (Br. in Opp. 14), it does not cite to any evidence in the record that Perry might pose a danger to others if not medicated. There are no findings that Perry is dangerous to others in his present prison setting, and there is no other record basis for viewing the medication order as resting on such a foundation. Accordingly, the medication order in this case rests only on the State's interest in facilitating Perry's execution.

fense) as well as the possibility of acquittal, and on the other the mere possibility of ultimate conviction and sentence to death. In view of those particular considerations, a directive of involuntary medication may be found to further the State's *parens patriae* interests by fulfilling the inmate's medical needs and other best interests. See *Whitmore v. Arkansas*, slip op. at 9-10 (noting that no litigant can "prove in advance that the judicial system will lead to any particular result in his case").

¹³ The court below specifically found that without his medication, Perry would in fact lapse into incompetence. Pet. App. 54. Perry's situation is therefore different from that of other inmates under sentence of death who may be suffering from a mental illness that would appropriately be treated with medication but that, if untreated, may never lead to incompetence under *Ford v. Wainwright*. In that situation, the balance of benefits and risks associated with medication may by no means be certain, as the medication would not be (as it is for Perry) a clear but-for cause of death.

2. Involuntary Medical Treatment is Impermissible if it is Contrary to the Patient's Medical Interests and is not Necessary to Treat a Condition that Threatens Harm to Others

In our view, involuntary medical treatment may never constitutionally be justified if, as here, it is contrary to the patient's medical interests. That view is strongly supported by decisions of this Court and lower courts as well as by the pertinent statutes governing involuntary hospitalization and treatment of the mentally ill. More narrowly, no source of which we are aware authorizes involuntary medication, including psychotropic medication, when it is contrary to the patient's medical interests and it is not needed to cure a condition that poses a danger to others.¹⁴ It is just such unprecedented authorization that Louisiana seeks here. This Court should reject the State's claim: in addition to consistent precedent and practice, compelling concerns respecting medical ethics and treatment establish that the State has no sufficient justification for overriding Perry's liberty interest.

a. This Court in *Harper* upheld a prison policy that authorized involuntary psychotropic medication only for prisoners who (1) suffer from a mental disorder and (2) either are gravely disabled or are a threat to themselves or others. 110 S. Ct. at 1033 & n.3. In finding the State's interest constitutionally sufficient, the Court repeatedly pointed out that involuntary medication was authorized only when a physician had found it to be "in the inmate's medical interest" and the patient was "dangerous to him-

¹⁴ Decisions approving compulsory quarantines and vaccinations are no exception to that rule: such measures typically protect public health and are not contrary to the individual's medical interests. See e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Compagnie Francaise De Navigation A Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902) (quarantine); *Morgan's Louisiana & T. R. & S.S. Co. v. Board of Health*, 118 U.S. 455 (1886) (quarantine).

self or others." *Id.* at 1039-40; see also *id.* at 1033, 1037 & n.8, 1039.¹⁵ Indeed, referring to those preconditions, the Court stated that the Due Process Clause recognizes a liberty interest that "permits refusal of antipsychotic drugs unless certain preconditions are met." 110 S. Ct. at 1040.

Similarly, every lower court decision that has upheld involuntary administration of psychotropic medication has done so only where a *parens patriae* interest underlies the medication decision. At least one court has explicitly required this *parens patriae* interest. See, e.g., *Bee v. Greaves*, 744 F.2d at 1395. Other courts have ratified a "professional judgment" standard that presupposes that medication is based on proper medical judgment. See, e.g., *United States v. Watson*, 893 F.2d 970, 975-76, 979-82 & n.14 (8th Cir.), *reh'g granted* (Apr. 20, 1990); *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984); *United States v. Bryant*, 670 F. Supp. 840, 842 (D. Minn. 1987). Several courts have upheld involuntary treatment noting that the treatment was in the patient's best medical interests. See, e.g., *Zaire v. Dalsheim*, 698 F. Supp. 57, 59 (S.D.N.Y. 1988) (forcible injection of diphtheria-tetanus inoculation to incoming prisoners not actionable under Eighth Amendment since its purpose was "solely to protect plaintiff and other inmates from harm"); cf. *United States v. Leatherman*, 580 F. Supp. 977, 978, 980 (D.D.C. 1983), *appeal dismissed*, 729 F.2d 863 (D.C. Cir. 1984). And a number of courts have disapproved the use of antipsychotic medication aimed solely at behavioral control or punishment in institutional settings. See, e.g., *Johnson v. Solomon*, 484 F. Supp. 278,

¹⁵ The majority's references to this point are numerous. See 110 S. Ct. at 1039 ("The drugs may be administered for no purpose other than treatment . . ."); *id.* at 1039-40 ("[T]he Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.").

309-10 (D. Md. 1979); *Pena v. New York State Div. for Youth*, 419 F. Supp. 203, 211 (S.D.N.Y. 1976) (involuntary medication may not be used as a behavior control device and as punishment rather than "as part of an ongoing treatment program authorized and supervised by a physician"); *Nelson v. Heyne*, 355 F. Supp. 451, 455 (N.D. Ind. 1972) (invalidating use of medication "for the purpose of controlling excited behavior rather than as part of an ongoing, psycho-therapeutic program"), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). See also *Jones v. United States*, 463 U.S. 354, 385 (1983) (dissenting opinion) (Supreme Court has never approved practice of administering "psychotropic medication to control behavior" or "for reasons that have more to do with the needs of the institution than with individualized therapy").¹⁶

¹⁶ Consistent with those decisions are the suggestions in several of this Court's cases that involuntary medication cannot be used for purposes of punishment. In *Vitek v. Jones*, this Court, in defining the liberty interest retained by a prisoner whom the State sought to transfer to a mental institution, recognized that a criminal conviction does not "entitle[] a State . . . to subject [a prisoner] involuntarily to institutional care in a mental hospital." 445 U.S. at 493. In *Harper*, three Justices flatly declared that "[f]orced administration of antipsychotic medication may not be used as a form of punishment." 110 S. Ct. at 1047 (Stevens, J., with Brennan and Marshall, JJ., concurring in part and dissenting in part). The majority in *Harper* did not disagree with that assertion. See also *Jones v. United States*, 463 U.S. at 373 n.4 (Brennan, J., with Marshall and Blackmun, JJ., dissenting) ("[I]t is questionable that confinement to a mental hospital would pass constitutional muster as appropriate punishment for any crime.").

Similarly, the Court in *Winston v. Lee*, 470 U.S. 753 (1985), albeit in the Fourth Amendment context, rejected a State's attempt to subject a criminal suspect to surgery in order to secure evidence. The Court relied in particular on the risk to the suspect's health presented by the surgery. *Id.* at 761.

Relevant legislative actions in this area reflect the same principles. No statute, state or federal, of which we are aware authorizes involuntary medication either specifically for purposes of facilitating execution by restoring competence or, more generally, where the medication is contrary to the patient's medical interests and unnecessary to protect others. Indeed, a Louisiana statute itself forbids medication of civilly committed mental patients for any but medical reasons. La. Rev. Stat. Ann. § 28:171(P) (West 1989) ("Medication shall not be used for non-medical reasons such as punishment or for convenience of the staff."); see also Pet. 11-12. Moreover, state statutes governing civil commitment uniformly require that the patient be mentally ill and either gravely disabled or dangerous to himself or others. See S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 34-35 (3d ed. 1985); *id.* at 114-18 (table 2.6) (collecting state statutes). See also *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Civil commitment as authorized in our country is intended "to treat the individual's mental illness and protect him and society from his potential dangerousness." *Jones v. United States*, 463 U.S. at 368.¹⁷

b. The widespread recognition of the prohibition on the government's ability to use involuntary medication for nonmedical ends is no accident. It reflects a deep-seated social interest in preserving medical care, in actuality and in public perception, as an unambiguously beneficent healing art. At least until state legislatures clearly declare otherwise—and neither in Louisiana (see note 17,

¹⁷ Louisiana's statute governing involuntary medication of mentally ill inmates reflects these same purposes. See La. Rev. Stat. Ann. § 15:830.1 (West 1981) (short-term involuntary medication possible only where treatment authorized by physician has been refused and physician certifies that medication is "necessary to prevent harm or injury to the inmate or to others"; longer term involuntary medication possible only upon judicial finding that inmate is incompetent and where treatment is "appropriate").

supra) nor elsewhere has a legislature authorized what the State urges here—a State's interest in departing from the familiar strictures on the use of medical treatment, and in allowing involuntary medication in order to facilitate a patient's death, cannot be deemed a sufficiently weighty one, because any such departure would threaten States' vital interests in the ethical standards and the treatment function of the medical profession.

To begin with, when the State's purpose in medicating someone involuntarily has no connection to either a *parens patriae* or dangerousness principle, the directive to medicate creates an excruciating ethical dilemma for treating physicians. See generally Note, *Medical Ethics and Competency to be Executed*, 96 Yale L.J. 167 (1986). Having taken the Hippocratic Oath, all physicians are duty-bound (1) to employ their treatment arts for the benefit of their patients and (2) to alleviate the patient's suffering. See *Washington v. Harper*, 110 S. Ct. at 1037 n.8 ("Unlike the dissent, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary.").¹⁸ In the present situation, however, those ethical norms are in conflict, for alleviation of present suffering by giving medication will lead, by restoration of competence, to death.

Though no longer explicitly enshrined in the code of medical ethics, the maxim *primum non nocere*—first, do no harm—has for centuries served as the ethical touchstone for the medical profession. Radelet & Barnard, *Treating Those Found Incompetent for Execution*:

¹⁸ The Declaration of Hawaii, adopted in 1977 by the World Psychiatric Association in response to the misuse of psychiatric treatment in the Soviet Union, prohibits compulsory treatment unless, among other things, "it is done in the patient's best interests." See *Psychiatric Ethics* 27, 351 (S. Bloch & P. Chodoff ed. 1981).

Ethical Chaos with Only One Solution, 16 Bull. Am. Acad. Psychiatry & Law 297, 298 (1988).¹⁹ Out of a recognition that doing harm is antithetical to the guiding spirit of medical ethics, the ethical code of the American Medical Association, as adopted and interpreted by the American Psychiatric Association, prohibits a psychiatrist from being "a participant in a legally authorized execution." APA, *The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry* § 1, Annot. 4 (1989). See also Council on Ethics and Judicial Affairs, American Medical Association, *Current Opinions* § 2.06 (1989). That principle, which derives directly from the Hippocratic Oath's prohibition on administering a poison (Oath of Hippocrates, reprinted in A. Dyer, *Ethics and Psychiatry: Toward Professional Definition* 41 (1988)), forbids a psychiatrist personally to administer a lethal injection. APA, *Opinions of the APA Ethics Committee on the Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* § 1-C (1989). See also A. Dyer, *supra*, at 39-40; Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. Legal Med. 383, 389-90 (1983). Administering involuntary medication in circumstances like the present is only a small step away from participating in the execution itself. See Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*,

¹⁹ When forensic psychiatrists testify for the State in criminal proceedings, they are not violating the maxim, because there is no treatment relationship. Instead, the psychiatrist is acting as a consultant in the adversary process, providing a professional evaluation that is frequently subject to cross-examination or to refutation by contrary evidence. See also APA, *The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry* § 7, Annot. 1 (1989) (psychiatrists may serve as consultants to judicial branch); *id.* at § 4, Annot. 6 (psychiatrist conducting examination for legal competence must first fully disclose nature and purpose of examination and lack of confidentiality). By contrast, the order in this case requires psychiatrists to employ their *treatment* arts to maintain competence so that their patient may be executed.

5 Behav. Sci. & Law 175, 183 (1987). Such a role stretches medical ethics to, if not beyond, the breaking point.²⁰

Physicians' ethical dilemma in giving medical treatment to facilitate capital punishment is mirrored in the resulting corruption of their treatment function. Physicians, and especially psychiatrists, require the trust of their patients. A treating psychiatrist must build a relationship with the patient to encourage communication of symptoms and to allow monitoring of the effects of medication. The psychiatrist must encourage the patient to speak openly to facilitate individual and group therapy. There can be few more certain ways of jeopardizing these necessary treatment functions than for the psychiatrist to become an instrument of punishment. See Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 Bull. Am. Acad. Psychiatry & Law 37, 49 (1986).

This concern is at its greatest with respect to patients in prison. Prisoners already have reasons to be suspicious of psychiatrists, because psychiatrists in an evaluative role often testify against prisoners in competency, insanity, and death penalty proceedings. If psychiatrists are now required to do harm to prisoners in their treatment role, the ability of all physicians to maintain an effective patient-physician relationship with prisoners will be significantly impaired.

Prisons and prisoners generally, and death row inmates particularly, can ill afford to be deprived of effective psychiatric care—either by the compromising of the physician-patient relationship or by psychiatrists' avoidance of death row prisoners for fear of being put in an ethically unconscionable position. The psychiatric needs

²⁰ Indeed, one psychiatrist in this case stated on the record that his ethical doubts prevented him from treating Perry. Pet. App. 80, 87 (testimony of Dr. Cox).

of death row inmates are acute.²¹ Despite an unquestioned need, the provision of psychiatric care in the Nation's prisons and jails leaves much to be desired. Kaufman, *The Violation of Psychiatric Standards of Care in Prisons*, 137 Am. J. Psychiatry 566 (1980); Valdiserri, *Psychiatry Behind Bars*, 12 Bull. Am. Acad. Psychiatry & Law 93, 93, 97 (1984); see also APA, *Task Force Report 29: Psychiatric Services in Jails and Prisons* (Mar. 1989). Numerous factors already operate to discourage psychiatrists from working with prison populations, including poor working conditions, the potential for conflicts with prison officials, the diminished emphasis on rehabilitation, and problems of prestige and remuneration. APA, *Task Force Report 29*, at 2; Valdiserri, *supra*, at 93-94. Allowing involuntary medication to be employed for the purposes of facilitating capital punishment would exacerbate those problems.²² The result would be to under-

²¹ Like Michael Perry, many inmates arrive with a long history of mental illness behind them. See, e.g., Lewis, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psychiatry 838, 840-41 (1986). Once on death row, inmates face unique psychological stresses. "[P]ossibly the most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 Am. J. Psychiatry 167, 167 (Aug. 1972); see also Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychology Rev. 141, 176-81 (1979). Available studies suggest that this stress causes a significant proportion of death row inmates to deteriorate psychologically. See Gallemore & Panton, *supra*, at 168, 169; Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 Am. J. Psychiatry 393 (Nov. 1962).

²² The reaction of Florida mental health professionals to treating Gary Alvord, an inmate who was judged incompetent for execution, is telling. Because of the ethical dilemmas they faced, all of the staff members who worked with Alvord said that they would not again become involved in treating an inmate judged incompetent to be executed. Radelet & Barnard, *supra*, 16 Bull. Am. Acad. Psychiatry & Law at 303-04.

mine important state interests without any evidence that state legislatures are ready to sacrifice them.

II. AFTER REMAND, THE STATE MUST COMMUTE PETITIONER'S SENTENCE TO LIFE IMPRISONMENT AND PROVIDE HIM WITH MEDICATION FOR TREATMENT PURPOSES

If this Court holds that a State cannot administer antipsychotic medication to a nonconsenting prisoner in order to facilitate his execution, Louisiana will face a choice. First, it could warehouse petitioner in an unmedicated state in the hope that someday he will regain competence spontaneously and thus become eligible for execution. Second, it could administer antipsychotic medication to alleviate petitioner's suffering, which means forgoing imposition of the death penalty. We submit that only the second option is constitutionally permissible.

The Eighth Amendment confers on prisoners a right to adequate medical treatment for known medical problems. See *Estelle v. Gamble*, 429 U.S. at 104; see also *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1005. That right clearly extends to the provision of adequate psychiatric care.²³ Unquestionably, for a State deliberately to allow a prisoner to languish with a treatable psychosis would violate the Eighth Amendment principle established in *Estelle v. Gamble*. See C. Beers, *A Mind That Found Itself: An Autobiography* (5th ed. 1921) (describing experience of severe mental illness); see also M. Bowers, *Retreat From Sanity: The Structure of Emerging Psychosis* 33-40

²³ See, e.g., *United States v. Kidder*, 869 F.2d 1328, 1330 & n.1 (9th Cir. 1989); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. Unit A 1981) (per curiam); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); *Guglielmoni v. Alexander*, 583 F. Supp. 821, 826 (D. Conn. 1984).

(1974) (quoting from accounts of experience of schizophrenia); S. Sheehan, *Is There No Place on Earth for Me?* 59-68 (1982) (describing behavior of acutely schizophrenic patient).

There is little need to belabor this obvious Eighth Amendment principle, because Louisiana itself concedes that "to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations . . . would violate Perry's rights under the Eighth Amendment." Br. in Opp. 15. But even if a State could, under some circumstances, justify withholding medical care needed for a known, serious medical problem, the State cannot plausibly do so here. Only two interests might be advanced to support withholding needed medical care—the State's interest in awaiting a spontaneous restoration of competence so that the sentence of death can be carried out; and the State's interest in combating the feigning of incompetence. Neither interest, however, stands up to analysis.

a. The possibility of spontaneous recovery can be of no help to Louisiana in this case. After hearing the expert testimony, the trial court found as a factual matter that Perry was "competent *only* while maintained on psychotropic medication in the form of Haldol." Pet. App. 54 (emphasis added). The State has not challenged that finding, and there is no record basis for any contrary suggestion that Perry might become competent without medication. See Br. in Opp. viii.

More generally, a State has at best only a slight interest in withholding medical care in the hope that a prisoner will spontaneously remit at some future time, thereby removing the barrier to his execution. For many psychotic patients, it is highly speculative that spontaneous recovery will ever occur. Even if *some* improvement does occur without medical intervention, moreover, that improvement may not be sufficient to achieve competence to be executed. And even if competence is achieved, a

relapse may occur before the State's execution machinery can be properly deployed. In any event, while the State waits for a sufficient spontaneous recovery, the prisoner continues to suffer from a psychosis, perhaps for years or even forever.

b. Nor can any state interest in preventing prisoners from feigning incompetence to be executed justify a deliberate refusal to give needed treatment to relieve the suffering caused by psychosis. Again, in *this* case, a court has already determined, after a series of adversary hearings, that petitioner is incompetent to be executed without his medication—a conclusion not challenged by the State. There is thus no issue of feigning here.

More generally, the State's interest in preventing feigning by *other* prisoners can be successfully furthered through the use of (1) clinical screening techniques and (2) legal burdens of proof. The clinical literature demonstrates the difficulty of successful feigning.²⁴ Certain conditions, notably severe mental retardation, are extremely difficult to feign because of the obvious possibility of verifying the condition by reference to an individual's school or vocational records. Resnick, *The Detection of Malingered Mental Illness*, 2 Behav. Sci. & Law 21, 29 (1984). For other conditions, psychiatrists now have at their disposal a range of methods shown by empirical studies to be effective in the detection of malingering. See generally Rogers, "Current Status of Clinical Methods," in *Clinical Assessment of Malingering and Deception* 293, 294-95 (R. Rogers ed. 1988) (summarizing usefulness of wide range of clinical and psychometric methods).²⁵ A large and growing body of

²⁴ In recent years, increasing attention has been focused on the problem of detecting malingering. See, e.g., *Clinical Assessment of Malingering and Deception* (R. Rogers ed. 1988); *Malingering and Deception: An Update*, 8 Behav. Sci. & Law 1-104 (1990) (Special issue).

²⁵ For example, malingering can be detected successfully with the aid of certain objective psychological instruments, principally

knowledge concerning the signs of malingering is now available to clinicians.²⁶ Special interview techniques may be helpful as well.²⁷ The psychiatrist's standard diagnos-

the Minnesota Multiphasic Personality Index (MMPI). See Rogers, *Towards an Empirical Model of Malingering and Deception*, 2 Behav. Sci. & Law 93, 99-101 (1984) (summarizing MMPI research). See generally Greene, "Assessment of Malingering and Defensiveness by Objective Personality Inventories," in *Clinical Assessment of Malingering and Deception* 123, 138-50 (R. Rogers ed. 1988) (explaining MMPI scales and their effectiveness and summarizing research). Newly developed tests have also been used with promising results. See Bagby, Gillis & Dickens, *Detection of Dissimulation with the New Generation of Objective Personality Measures*, 8 Behav. Sci. & Law 93 (1990) (Basic Personality Inventory and the Millon Clinical Multiaxial Inventory-II). Use of a combination of different objective tests including the MMPI may be especially useful. Schretlen & Arkowitz, *A Psychological Test Battery to Detect Prison Inmates who Fake Insanity or Mental Retardation*, 8 Behav. Sci. & Law 75 (1990).

²⁶ Researchers have documented and catalogued common clinical indicators such as the malingerer's tendency to (1) exaggerate the severity of symptoms, (2) display symptoms that are rare or inconsistent with a diagnostic category, and (3) provide virtually no random responses or "self-damaging" statements. Rogers, *supra*, 2 Behav. Sci. & Law at 94-95, 106; Resnick, *supra*, 2 Behav. Sci. & Law at 31-32 (summarizing sixteen common clues to malingered psychoses). More, too, is known about the usual experience of persons with particular mental illnesses or particular symptoms. See Resnick, "Malingered Psychosis," in *Clinical Assessment of Malingering and Deception* 34 (R. Rogers ed. 1988). For example, several researchers have studied the characteristics of auditory hallucinations in schizophrenic patients, yielding a body of clinical knowledge against which the symptoms of suspected malingerers can be judged. *Id.* at 37-39; Resnick, *supra*, 2 Behav. Sci. & Law at 27-28. Nonverbal indicators such as facial expression and movement of limbs can also be used successfully by clinicians to detect feigners. Rogers, *supra*, 2 Behav. Sci. & Law at 101-05.

²⁷ See Rogers, "Structured Interviews and Dissimulation," in *Clinical Assessment of Malingering and Deception* 250 (R. Rogers ed. 1988); see also Rogers, Gillis & Bagby, *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 Behav. Sci. & Law 85 (1990) (structured interview technique successfully used on prison population).

tic handbook itself provides useful guidance in identifying fakery. See APA, *Diagnostic and Statistical Manual of Mental Disorders* 360 (3d rev. ed. 1987).²⁸

In addition to psychiatric evaluations, legal procedures for raising incompetence claims can and do operate to thwart a death row inmate's ability to feign incompetence. As Justice Powell observed in his *Ford* concurrence, once convicted and sentenced, an inmate must overcome a presumption of sanity. 477 U.S. at 425-26. Louisiana law, for example, requires a prisoner to bear the burden of demonstrating "reasonable ground[s]" to believe that he is incompetent to be executed in order to get a sanity commission appointed in the first place. *State v. Perry*, 502 So.2d at 564.²⁹ A prisoner such as Perry also bears a second burden of persuasion—by a preponderance of the evidence—on the ultimate issue of incompetence. *Ibid.*

The foregoing clinical and legal safeguards, taken together, greatly reduce the danger that a prisoner will be able to feign a mental condition that constitutes incompetence, at least under the standards suggested by Justice Powell in *Ford*. And, of course, additional procedures could be adopted if experience proves them necessary to

²⁸ Of course, a prisoner's incentive to feign is at its acme in the context of determining competence to be executed. Clinicians, however, will be well aware of that incentive; indeed, psychiatrists are specifically advised by the standard diagnostic handbook (at 360) to consider the clinico-legal context in evaluating signs of malingering. Moreover, in this unique context, special measures to uncover malingering may be employed, such as a particularly close review of past psychiatric records, including a comparison of symptoms past and present. See Lewis, *et al.*, *supra*, 143 Am. J. Psychiatry at 842-44 (clinical findings verified by examining objective evidence such as hospital records, using psychological and educational tests, and interviewing parents).

²⁹ Here, Perry did just that. See Pet. App. 69. Compare *Caldwell v. Tennessee*, 1990 Tenn. Crim. App. LEXIS 235, at *19-21 (Tenn. Ct. Crim. App. Mar. 21, 1990) (upholding refusal to appoint sanity commission).

provide greater assurance of accuracy. At present, however, it would be groundless speculation to conclude that feigning is effectively incapable of detection and thereby permit the State to forgo providing appropriate medical care to an inmate.

In short, a State has no real interest in allowing an incompetent inmate like Perry to suffer for lack of needed medication. The Eighth Amendment thus requires the State to administer to petitioner whatever medication is appropriate for treatment purposes and to commute his sentence to life imprisonment.³⁰ This course will resolve the supposed "Catch-22 situation" posited by the State (Br. in Opp. 14)—i.e., that the State is barred from involuntarily medicating petitioner but at the same time is required by the Eighth Amendment to provide psychiatric care. The State can meet its Eighth Amendment obligation by medicating petitioner to promote a true *parens patriae* interest in serving his medical needs; it simply cannot medicate petitioner solely for purposes of capital punishment.³¹

³⁰ This solution has been mandated by statute in Maryland. There, once an inmate is found incompetent to be executed, his sentence is automatically commuted to life imprisonment. Md. Ann. Code art. 27, § 75A(d)(3) (1987 Repl. Vol.). In addition, commutation for incompetent death row inmates was the uniform practice in England between the early 1840s and 1965, when England abolished the death penalty. 1 N. Walker, *Crime and Insanity in England: The Historical Perspective* 205, 216 (1967); Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U.L. Rev. 434, 475 (1964); see also R. Duff, *Trials and Punishments* 15 (1986).

³¹ In light of the ethical dilemmas, psychiatrists in this country who have worked with the few inmates found incompetent to be executed, and other commentators, have also endorsed this approach. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U.L. Rev. 35, 91 (1986) (Florida State Hospital Human Rights Committee's recommended commutation rule after dealing with dilemmas posed by treating Gary Alvord); Note, *supra*, 96 Yale L.J. at 186; Radelet & Barnard, *supra*, 16 Bull. Am. Acad. Psychiatry & Law at 301-06 (describing Alvord case at length).

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1989

MICHAEL OWEN PERRY,

Petitioner

v.

STATE OF LOUISIANA,

Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE AND
BRIEF AMICUS CURIAE OF THE COALITION FOR
THE FUNDAMENTAL RIGHTS AND EQUALITY OF
EX-PATIENTS IN SUPPORT OF PETITIONER
AND FOR REVERSAL OF THE JUDGMENT BELOW

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THE COALITION FOR THE FUNDAMENTAL RIGHTS AND
EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER
AND FOR THE REVERSAL OF THE JUDGMENT BELOW

The Coalition for the Fundamental Rights and Equality of Ex-Patients (herewithin "Coalition for the FREE" or the "Coalition") respectfully submits this motion to request permission to file its proposed brief *amicus curiae* in support of petitioner and for reversal of the judgment below in this case.

Consent to the filing of this brief has been requested from counsel for both petitioner and respondent, but has not yet been received. Therefore, this motion is being filed in lieu of any such consents.

The Coalition for the FREE seeks this Court's permission to file its brief *amicus curiae* in this case because of the particular interest and experience of its members in the various issues involved in this case. The organizational members of the Coal-

ition for the FREE¹ are all groups whose primary interest and activities concern the promotion of public understanding of mental health issues and the protection of the rights of the mentally ill and of present and former mental patients. Individual members and clients of these organizations include many present and former patients, their families and friends, as well as advocates for people with mental illness.

During the past decade, the Coalition and/or its individual members have filed or proposed to file briefs *amicus curiae* in cases involving issues similar to those in this case in this Court and in leading state courts throughout the United States.²

¹ The participants in the Coalition for the FREE in this case are as follows: the National Mental Health Association; the New Jersey Department of the Public Advocate, Pennsylvania Protection and Advocacy, Inc.; the Mental Health Consumers' National Legal Defense and Education Project; the Mental Health Patients' Association of New Jersey and the Mental Patients Association of Philadelphia (a more complete description of each of the members of the Coalition is included on page 1 of the proposed brief *amicus curiae* attached hereto).

² See, e.g. the briefs of the Coalition in *United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto*, U.S. , 106 S. Ct. 2683, (1986), *Colorado v. Connelly*, U.S. , 107 S. Ct. 515 (1986) and *Washington v. Harper*, U.S. , 110 S.Ct. 1028 (1990). See also the Brief of the Office of the Capital Collateral Representative, et. al. as *amicus curiae* in *Ford v. Wainwright*, 472 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 355 (1986) and the proposed brief *amicus curiae* in *Satterwhite v. Texas*, U.S. , 108 S. Ct. 1792 (1988). See, also the brief *amicus curiae* of the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy in *Harper*, 110 S. Ct. at p. 1052, n. 22. The Coalition has also filed or participated in *amici* briefs in state court cases across the United States involving the "right to refuse" forced drugging: *Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987), *Jones v. Gerhardtstein*, 141 Wis. 2d 710, 416 N.W. 2d 883, (1987) and *Application of Anonymous ("Billie Boggs")*, N.Y. Court of Appeals, No. 95565/87.

In this case, the Court will hear arguments on a wide range of issues on which the Coalition is knowledgeable including the issues of access to the assistance of counsel regarding psychiatric interviews and hospital reports, the right to refuse psychotropic drugging and the standards for determining competency to be executed. Many of the members of the Coalition -- and/or clients of the Coalition members -- have themselves been involved in court proceedings which emphasized these or other closely related questions. Whatever this Court decides here will undoubtedly affect the outcome of similar cases in the future. Therefore, the Coalition members now wish to share their specialized knowledge and insights with the Court and the parties in this case.

The Coalition believes that no other party or *amicus* in this case will make available to the Court the consumer oriented arguments set forth in its Brief regarding the issues of right to the assistance of counsel, the right to refuse and the competency standards for execution, as well as current research and commentary on these issues. Because of their demonstrated concern and historic involvement in similar proceedings, the Coalition believes that it has a clear interest in these matters and can offer a significant alternative viewpoint on these issues to this Court. It therefore respectfully submits this proposed Brief *amicus curiae*.


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QUESTIONS PRESENTED

- (1) Do the Eighth and Fourteenth Amendments prohibit state from forcibly injecting insane death row inmate with mind-altering drugs when such drugs are not used for treatment but are administered solely in attempt to make him competent to be executed?
- (2) Is it unconstitutionally cruel and unusual punishment to circumvent prohibition of *Ford v. Wainwright*, 477 U.S. 399, 54 LW 4799 (1986), against executing insane person by forcibly injecting insane inmate with mind-altering drugs in attempt to make him sane, particularly when court's order imposes no limits whatsoever on these injections?
- (3) What standard applies to determine whether Louisiana inmate is competent to be executed?
- (4) Do that standard, Eighth Amendment and *Ford v. Wainwright* prohibit execution of person who has been unani-
mously diagnosed as suffering from major psychotic ill-
ness, whose sanity, even on medication, varies from mo-
ment to moment and who varies "like moving target" in
his appreciation for crime for which he has been convicted
and punishment that he has been condemned to suffer?
- (5) Is Fourteenth Amendment violated when trial court re-
ceives ex parte communications from state department of
corrections and then relies upon them in reaching its deci-
sion to order forcible injections, without giving defense
notice or opportunity to be heard?
- (6) Is it denial of right to counsel for court to have inmate
interviewed without counsel being notified or being al-
lowed to be present?

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is being filed in support of petitioner and his right to notice, confrontation and counsel with regard to hospital reports on his competency, his "right to refuse" unwanted and potentially dangerous psychotropic drugs and his right not to be executed, while his sanity varies "like a moving target."

Amicus curiae, the organizational members of the Coalition for the Fundamental Rights and Equality of Ex-Patients¹ (herein-after "The Coalition for the FREE") are all groups whose primary interests and activities concern the promotion of public understanding of mental health issues and the protection of the rights of persons with mental illness and of present and former mental patients.

¹ The participants in the Coalition for the FREE are as follows:

NATIONAL MENTAL HEALTH ASSOCIATION

The National Mental Health Association ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the Association has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and state divisions working across the United States. It is composed of volunteers who are mostly non-mental health professionals. Some are family members whose loved ones have been affected by mental illness; others are former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

PENNSYLVANIA PROTECTION AND ADVOCACY, INC.

Pennsylvania Protection and Advocacy, Inc. ("PPA") is the federally mandated protection and advocacy agency in Pennsylvania for persons diagnosed as mentally ill pursuant to 42 U.S.C.A. 10301 *et. seq.* PPA has been *amici* in numerous cases before this and other courts including most recently *Zebley v. Sullivan*, U.S. , 110 S. Ct. 885 (1990).

NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE DIVISION OF MENTAL HEALTH ADVOCACY

The New Jersey Department of the Public Advocate (NJPA), through its Division of Mental Health Advocacy (DMHA), is a cabinet-level state agency that has represented psychiatric patients for 15 years in a wide range of matters including civil commitment, civil commitment of prisoners and medication refusal, pursuant to enabling legislation, N.J.S.A. 52:27E-21 through 27. In addition, the New Jersey Public Advocate is the federal Protection

Members and clients of these organizations include many present and former patients, their families and friends, as well as other advocates for persons with mental illness. The Coalition for the FREE and its organizational members have appeared as *amicus* before the courts in numerous cases related to the issues

and Advocacy Agency for Individuals with Mental Illness under 42 U.S.C.A. 10801 *et. seq.* In civil commitment cases alone, the Division of Mental Health Advocacy has represented individuals at more than 95, 167 hearings since its inception. Ten years ago, the New Jersey Public Advocate, Division of Mental Health Advocacy, represented the plaintiff class in *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), 476 F. Supp. 1294 (D.N.J. 1979), modified and rem'd 653 F. 2d 836 (3d Cir. 1981) (*en banc*), vacated and rem'd 458 U.S. 1119, 102 S. Ct. 3506 (1982) on remand 720 F. 2d 266 (3d Cir. 1983) (*en banc*) which was one of the first cases in the United States to determine the right of psychiatric patients to refuse psychotropic medication. In addition, the DMHA has filed numerous *amicus* briefs in cases before this and other courts on issues related to patients rights and mental health advocacy. See, e.g., brief *amicus curiae* in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and the proposed brief *amicus curiae* in *Mills v. Rogers*, 457 U.S. 291 (1982).

THE MENTAL HEALTH CONSUMERS' NATIONAL LEGAL DEFENSE AND EDUCATION PROJECT

The Mental Health Consumers' National Legal Defense and Education Project was organized by consumers in Philadelphia, Pennsylvania in 1988 to provide technical assistance, research and training to mental health consumers and their advocates on legal and policy issues involving mental illness and consumers' rights and to assist consumers with access to the courts, legislatures and agencies on matters affecting their lives as consumers of mental health services.

THE MENTAL PATIENTS' ASSOCIATION OF NEW JERSEY

The Mental Health Patients' Association of New Jersey was established in May, 1984 in Asbury Park, New Jersey and is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

THE MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA

The Association was formed in Philadelphia in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

contrary to the "dignity of man" or outside "the limits of civilized standards." *Trop*, 356 U.S. at 100. Thus, unless the Eighth Amendment is turned on its head, it cannot be construed as prohibiting appropriate and beneficial psychiatric treatment.

Despite the recognized benefits to Perry of neuroleptic medication, Perry seems to argue that nonconsensual administration of such medication constitutes cruel and unusual punishment because the State's purpose is to induce competency for execution. That argument is without merit. Medication of Perry is, of course, intended to render him competent for execution. In fact, *every* aspect of Perry's confinement contemplates, and is intended to facilitate, Perry's eventual execution. Perry's confinement itself is a precursor to execution of the death penalty. Yet his mere imprisonment is certainly not cruel and unusual punishment. Because capital punishment is an acceptable penalty under the Eighth Amendment, the State must be allowed to employ the means necessary to carry out the death penalty unless those means are themselves cruel and unusual. In short, treatment of a prisoner which is not otherwise violative of the Eighth Amendment does not become cruel and unusual punishment merely because it facilitates execution.

In this case, involuntary treatment is not only permitted by the Eighth Amendment, but it is mandated by the Amendment. This Court held in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), that "deliberate indifference to serious medical needs of prisoners" constitutes cruel and unusual punishment. Hence, the Eighth Amendment creates a State duty to provide prisoners with medical treatment. In compliance with that duty, the State has been treating Perry with psychotropic drugs since his conviction. Now, at the instructions of his lawyers, Perry refuses to accept prescribed medication. Nevertheless, the State cannot ignore its duty to care for Perry's medical needs. Because Perry loses touch with reality when he goes without his medication, he cannot be considered competent to make his own treatment decisions. Indeed, Perry's counsel conceded as much when he moved for appointment as Perry's decision-maker: "the decision making processes of the defendant are so impaired as to render them completely unreliable." (R. 187). Thus, notwithstanding Perry's refusal of medication, the State, as Perry's custodian, must ensure that he receives proper psychiatric treatment.

To honor Perry's objections and allow him to languish in a continual state of psychosis, tortured by hallucinations, delusions and paranoid fantasies, would unquestionably constitute cruel and unusual punishment. See Brief for the American Psychiatric Association *et al.* at 20.

B. There is no national consensus against involuntary medication of capital offenders to achieve competency for execution.

Even assuming for the sake of argument that beneficial medical treatment could constitute cruel and unusual punishment under some circumstances, the Eighth Amendment does not forbid prescribed medication of death row inmates which produces competency for execution. Perry insists that there is a national consensus opposing such medication. However, medication which induces competency for execution is entirely consistent with contemporary American standards regarding treatment of mentally ill prisoners.

This Court has held that the Eighth Amendment ban on cruel and unusual punishment is not limited to those penalties forbidden at the time the Bill of Rights was adopted.¹⁴ *Ford*, 477 U.S. at 406; *Gregg*, 428 U.S. at 171 (joint opinion of Stewart, Powell and Stevens, JJ.). Rather, the Eighth Amendment proscription extends to punishments which are contrary to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Thus, where there is a national consensus against a particular punishment, this Court will find imposition of that punishment to be cruel and unusual in violation of the Eighth Amendment. *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969 (1989); *Penry*, ___ U.S. ___, 109 S.Ct. 2934. In determining whether a national consensus exists, this Court looks to "objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell and Stevens, JJ.). In particular, the Court considers legislation

¹⁴Perry does not argue that involuntary medication to restore sanity for execution was prohibited at common law. Nor could he. Antipsychotic drugs were not available as a treatment for mental illness until this century. Kessler & Waletzky, *supra*, note 8, at 202; Haddox & Pollack, *Psychopharmaceutical Restoration to Present Sanity (Mental Competency to Stand Trial)*, 17 J. Forensic Sci. 568, 570-71 (1972).

to be "the primary and most reliable indication of consensus." *Stanford*, ___ U.S. at ___, 109 S.Ct. at 2977.

A review of state legislation reveals no "objective evidence . . . of an emerging national consensus," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2955, against medication of death row inmates to produce competency for execution. No jurisdiction explicitly prohibits such medication. On the other hand, contrary to Perry's allegation that "[n]o state has passed legislation authorizing the use of medication to establish competency for execution," Brief for Petitioner at 40 (emphasis omitted), Maryland expressly allows medication of condemned prisoners to restore competency. See Appendix E. Moreover, of the 37 states which have enacted capital punishment, 24 (including Maryland) contemplate the use of medication to produce competency by specifically authorizing treatment of incompetent death row inmates or by providing that the execution of such inmates will be stayed or suspended *until competency is regained*.¹⁵ See Appendix F. The statutes of the remaining 13 death penalty states, including Louisiana, are silent on the issue of restoration of competency. However, these 13 states, as well as the 13 states and the District of Columbia which do not allow capital punishment, authorize involuntary treatment of prisoners and criminal defendants in other contexts.¹⁶ See Appendixes H and I. Thus, involuntary medication of prisoners is not, in and of itself, contrary to contemporary values.¹⁷ Moreover, at least twenty states statutorily provide that competency to stand trial may be achieved with medication. See Appendix J.

¹⁵In addition, three other states had similar provisions before outlawing capital punishment. See Appendix G.

¹⁶As evidence of a national consensus against involuntary medication of prisoners, Perry points this Court to a host of state statutes regarding the rights of civilly committed patients. Appendix to Brief for Petitioner, Chart 2. However, because prisoners do not necessarily possess the same rights enjoyed by those who have not been convicted of crimes, statutes governing treatment of civilly committed patients are for the most part irrelevant to the issue of contemporary standards regarding treatment of prisoners.

¹⁷Indeed, 20 states authorize capital punishment by lethal injection. U.S. Department of Justice, Bureau of Justice Statistics, *Capital Punishment 1988*, 5, Table 2 (1989).

Recently, in *Stanford v. Kentucky*, ___ U.S. ___, ___, 109 S.Ct. 2969, 2975-76 (1989), this Court held that a showing that 15 states forbid the execution of 16-year-old offenders and that 12 states forbid the execution of 17-year-old offenders did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Thus, in claiming that involuntary medication of prisoners to achieve competency for execution is prohibited by the Eighth Amendment, it is Perry's "heavy burden" . . . to establish a national consensus *against* it." *Id.* at ___, 109 S.Ct. at 2977 (citation omitted). As the above survey of state legislation demonstrates, Perry has failed to carry that burden. Not a single state has enacted legislation forbidding medication of prisoners to restore competency for execution. Moreover, such medication is *authorized* by the only state which has specifically addressed the issue by statute. Hence, "the clearest and most reliable objective evidence of contemporary values," *Penry*, ___ U.S. at ___, 109 S.Ct. at 2953, reveals absolutely no opposition to the use of medication to achieve competency for execution, much less a national consensus against such treatment. In short, medication of condemned prisoners to produce competency is not contrary to "evolving standards of decency."¹⁸

C. Nonconsensual treatment of death row inmates which produces competency for execution does not violate the Eighth Amendment prohibition of excessive punishment.

¹⁸Perry places great emphasis on the fact that the state court's order is not specifically authorized by state statute or by a decision of the state Supreme Court but rather is, as he phrases it, "the product of penological policy-making by a single trial judge." Brief for Petitioner at 37. That is beside the point. A particular punishment need not be explicitly sanctioned by statute or supreme court decision in order to be permissible under the Eighth Amendment. For example, in *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934 (1989), a mentally retarded murderer was sentenced to death; the sentence was not based on an explicit state authorization of capital punishment of mentally retarded murderers. Yet this Court refused to hold that execution of mentally retarded offenders violates the Eighth Amendment. Likewise, in this case, Louisiana's failure to expressly authorize the treatment at issue does not render that treatment violative of the Eighth Amendment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justices Stewart, Powell and Stevens wrote that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive [of the Eighth Amendment issue]. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' . . . This means, at least, that the punishment not be 'excessive.'" *Id.* at 173 (joint opinion of Stewart, Powell and Stevens, JJ.) (citation omitted). "Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). See also *Stanford*, ___ U.S. ___, 109 S.Ct. 2969 (O'Connor, J., concurring in part and concurring in the judgment); *id.* (Brennan, J., dissenting); *Penry*, ___ U.S. ___, 109 S.Ct. 2934 (opinion of O'Connor, J.); *id.* (Brennan, J., concurring in part and dissenting in part). As explained below, medication of incompetent death row inmates is not only consistent with this nation's "evolving standards of decency," but it survives the excessiveness inquiry suggested by *Gregg*.¹⁹

There are two generally accepted purposes of the death penalty: retribution and deterrence. *Enmund v. Florida*, 458 U.S. 782 (1982). "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. . . . [C]ertain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg*, 428 U.S. at 183-84 (joint opinion of Stewart, Powell and Stevens, JJ.) (footnotes omitted). In addition, the death penalty can be in some cases an effective deterrent to potential capital offenders: "[t]here are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." *Id.* at 186 (footnotes omitted).

¹⁹Perry does not expressly claim that involuntary medication to achieve competency for execution violates the Eighth Amendment proscription of excessive punishment. Nevertheless, because the basis for Perry's Eighth Amendment claim is not entirely clear, we address the excessiveness issue.

Medication of death row inmates which produces competency for execution significantly contributes to both goals of the death penalty. It is readily apparent that, if a condemned prisoner is shielded from execution by virtue of incompetency, the State cannot give effect to society's moral outrage at the prisoner's crime. Medication which restores competency and thereby allows execution of the death penalty thus satisfies the retributive goal of capital punishment. In addition, medication which induces competency enhances the deterrent effect of the death penalty by increasing the likelihood of execution. As loopholes to execution are narrowed or closed, the death penalty becomes a more certain punishment and hence a better deterrent. Thus, by limiting the effectiveness of mental illness as an escape hatch from execution, medication of incompetent death row inmates contributes to the penological goal of deterrence.

The second prong of the Eighth Amendment excessiveness inquiry requires evaluation of the proportionality of the punishment in relation to the seriousness of the offense. See *Solem v. Helm*, 463 U.S. 277 (1983). As Justices Stewart, Powell and Stevens explained in *Gregg*, "[t]here is no question that death as a punishment is unique in its severity and irrevocability." *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell and Stevens, JJ.). Yet capital punishment is not invariably disproportionate punishment for the crime of deliberate murder. *Id.* Assuming for the sake of argument that involuntary medication to achieve competency for execution increases the severity of a capital offender's punishment, such medication certainly does not constitute punishment that is so severe as to be disproportionate to the crime of premeditated murder, "the most extreme of crimes." *Id.* Murders which are "so grievous an affront to humanity," *id.* at 184, as to justify the ultimate penalty of death must likewise merit the relatively minor intrusion of nonconsensual medication.

In this case in particular, the "penalty" of involuntary medication is amply justified by Perry's cold-blooded murders of five members of his family. As described by the Louisiana Supreme Court, Perry's crimes were particularly egregious:

The offense was a shocking mass murder in a small town. Five members of defendant's family were killed on a Sunday morning, two as they slept in their beds. After killing his

parents, his cousins and a nephew, the defendant took money from his mother's belongings and from his father's pockets and fled the state in his father's car, taking refuge [sic] in a Washington hotel. He killed the adult victims in their own homes in a violent, bloody encounter which was deliberately planned. He waited for his parents more than an hour following his murder of his two cousins in a house just two doors away. A total of three weapons were used. The death penalty in such a case is proportionate to the offenses and to this particular defendant.

(J.A. 40-41). Obviously involuntary medication is not overly severe treatment for the criminal responsible for these crimes. The brutal slayings of five people, including a two-year-old child, merit the death penalty, even if carrying out that penalty requires treating Perry with medication to achieve his competency.

III. Perry has no Fourteenth Amendment right to refuse prescribed medication which will render him competent to be executed.

In addition to his Eighth Amendment argument, Perry contends that he is protected from unwanted medication by the Fourteenth Amendment. According to Perry, both the Due Process Clause and Louisiana law grant state prisoners a liberty interest in refusing antipsychotic medication. However, a sentence of death justifies restrictions on a condemned inmate's liberty which are necessary to carry out the death penalty; thus, a death row inmate who requires medication to be competent for execution is not entitled by the Fourteenth Amendment to refuse such medication. Moreover, Louisiana law does not create a constitutionally protected liberty interest in avoiding medication which is intended to produce competency for execution. Finally, even assuming that Perry has a liberty interest in refusing medication, that interest is overridden by the State's interest in effectuating the death penalty.

A. The imposition of a sentence of death extinguishes the right created by the Due Process Clause to refuse prescribed antipsychotic medication.

This Court has consistently recognized that prisoners do not retain the full range of liberty interests enjoyed by others. It is self-evident that a conviction and sentence of imprisonment necessarily extinguish the right to be free from confinement. Likewise, a

conviction and sentence of imprisonment justify restrictions on an inmate's freedom which are "ordinarily contemplated by a prison sentence." *Hewitt*, 459 U.S. at 468. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our prison system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). Thus, this Court has held that prisoners do not enjoy constitutionally created rights to be free from administrative segregation, *Hewitt*, 459 U.S. 460, restrictions on visitation, *Thompson*, ___ U.S. ___, 109 S.Ct. 1904, interstate transfer from one prison to another, *Meachum v. Fano*, 427 U.S. 215 (1976), or transfer to an out-of-state prison, *Olim v. Wakinekona*, 461 U.S. 238 (1983). "As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye*, 427 U.S. at 242. See also *Vitek v. Jones*, 445 U.S. 480 (1980).

In *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990), this Court held that a Washington State prisoner had a liberty interest under the Due Process Clause of the Fourteenth Amendment in refusing medication with psychotropic drugs. The Court explicitly recognized, however, that "[t]he extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.* at ___, 110 S.Ct. at 1037.

In this case, Perry's interest in refusing antipsychotic medication must be viewed in light of his sentence of death. Just as a sentence of imprisonment justifies conditions of confinement which are "within the sentence imposed," *Montanye*, 427 U.S. at 242, so does a sentence of death justify restrictions on liberty which are required to effectuate the death penalty. A sentence of death contemplates that the liberty interests of the condemned inmate will be restricted to the extent necessary to carry out that sentence. For example, a sentence of death by electrocution requires that the condemned prisoner be physically strapped to the electric chair; as a result, the constitutional liberty interest in freedom from bodily restraint, see *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), is superseded by imposition of the death penalty.

The State cannot carry out Perry's sentence of death unless his competence to be executed is maintained with the use of antipsychotic drugs. Treatment of Perry with such medication is thus a necessary precondition to execution of Perry's sentence and is therefore "within the sentence imposed upon him." *Montanye*, 427 U.S. at 242. In short, the *Harper* right to be free from involuntary medication was extinguished by Perry's sentence of death.

B. Louisiana has not created a constitutionally protected liberty interest in avoiding medication intended to achieve competency for execution.

As previously noted, the decisions of this Court establish that "where a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." *Ford*, 477 U.S. at 428 (O'Connor, J., concurring in the result in part and dissenting in part), quoting *Hewitt v. Helms*, 459 U.S. at 471-72. Perry maintains that Louisiana law creates a constitutionally protected right to refuse psychiatric treatment intended to achieve competency for execution. Specifically, Perry asserts that La. C.Cr.P. art. 648, La. R.S. 15:830.1, and La. R.S. 28:171(P) grant him a constitutionally protected liberty interest in avoiding the medication authorized by the state court. However, none of those statutes creates such a liberty interest.

La. C.Cr.P. art. 648, which is reproduced in Appendix B, provides that, when a criminal defendant is judicially determined to be incapable of standing trial, he shall be committed "to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues." La. C.Cr.P. art. 648A. The statute further provides that if, after commitment, the court finds that the defendant is not likely to become capable of standing trial, the defendant shall be released on probation or, if he is a danger to himself or others, civilly committed for treatment. La. C.Cr.P. art. 648B. Although Article 648 is addressed to determinations of capacity to proceed to trial, Perry submits that the Code articles governing claims of incompetency to stand trial, including Article 648, have been applied by the Louisiana Supreme Court in the post-conviction context. However, as explained *supra* at pages 18-19, only the

procedural requirements of La. C.Cr.P. arts. 641 *et seq.* have been extended to the post-conviction setting. Thus, any substantive right created by Article 648 is not available to Perry. More importantly, though, Article 648 plainly does not recognize a right to refuse treatment. In fact, the Article explicitly *requires* treatment to achieve competency. So, assuming for the sake of argument that Article 648 is fully applicable to post-conviction competency proceedings, it specifically authorizes the treatment ordered in this case.

La. R.S. 28:171(P) is likewise inapplicable here. Section 171, which is reproduced in Appendix C, is a declaration of the rights of patients in state treatment facilities for the mentally ill; it simply does not apply to treatment of prisoners on death row.²⁰ Assuming *arguendo* that the statute applies, it does not create a right to refuse the medication at issue in this case. La. R.S. 28:171(P) provides that "[n]o medication may be administered to a patient except upon the order of a physician. . . . Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff." Perry claims that this provision prohibits any medication which is not for "treatment." However, as explained *supra* at pages 29-30, the medication authorized by the state court is to "treat" Perry. So, if Section 171(P) establishes treatment as a "substantive predicate" absent which medication will not be ordered, that substantive predicate has been met.²¹

²⁰La. R.S. 28:2(28)(C) specifically excludes prisons and jails from the definition of "treatment facility." See Appendix C. Moreover, a reading of Section 171 in its entirety makes it crystal clear that it was not intended to apply to state prisoners. The Section grants patients the rights to "unimpeded, private and uncensored communication . . . by mail, telephone and visitation," La. R.S. 28:171(C), to "be employed at a useful occupation," La. R.S. 28:171(H), and to "wear [their] own clothes," La. R.S. 28:171(G). Certainly, the legislature did not intend to grant those rights to death row inmates.

²¹The mere fact that Perry's treatment also produces competency for execution is of no consequence. Section 171(P) cannot be read as prohibiting medically necessary treatment merely because the treatment also serves another purpose. Indeed, as discussed above, La. C.Cr.P. art. 648 explicitly requires treatment to produce competency to stand trial. Thus, Louisiana law does not categorically forbid the use of medically appropriate treatment to produce competency.

Unlike Article 648 and Section 171, La. R.S. 15:830.1, reproduced in Appendix D, does apply in the prison setting. That statute provides for involuntary treatment of a mentally ill prisoner for up to fifteen days when a prison physician or psychiatrist "certifies that the treatment is necessary to prevent harm or injury to the inmate or to others." La. R.S. 15:830.1A. Section 830.1 further provides that, when treatment for more than fifteen days "is deemed necessary," judicial proceedings shall be initiated to determine whether the inmate should be committed to a treatment facility for continued treatment. *Id.* The proceedings must "be in accord with all procedures required by law in the case of judicial commitment." La. R.S. 15:830.1C. Treatment of the prisoner must continue during pendency of the proceedings. La. R.S. 15:830.1A. Following a judicial hearing at which the prisoner is represented by counsel, "the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided." *Id.*

Section 830.1 does not create a constitutionally protected liberty interest because it does not contain "explicitly mandatory language" that nonconsensual medication "will not occur absent specified substantive predicates." *Hewitt*, 459 U.S. at 472. Section 830.1 provides that involuntary medication of a prisoner "will be permitted" if such treatment "is necessary to prevent harm or injury to the inmate or to others," La. R.S. 15:830.1A, but it does not *mandate* treatment under those circumstances. Thus, the statute "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met." *Thompson*, ___ U.S. at ___, 109 S.Ct. at 1910 (footnote omitted). Moreover, Section 830.1 does not specify that involuntary medication is permitted *only* if necessary to prevent harm or injury. A finding that medication is necessary to prevent harm or injury is a *sufficient* condition for nonconsensual administration of neuroleptic medication, but it is not a *necessary* condition for that treatment. Perry cannot therefore "reasonably form an objective expectation" that he will not be medicated absent a finding that he poses a risk of harm or injury to himself or others. *Id.* at ___, 109 S.Ct. at 1911. In other words, even if Section 830.1 creates an expectation that an inmate *will* be medicated if necessary to prevent harm or injury, the statute does not create "a justifiable expectation on the part of the inmate that the drugs will *not*

be administered unless [that condition] exist[s]." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1036 (emphasis added).²²

C. Even assuming that a death row inmate retains a liberty interest in being free from involuntary medication, such interest is outweighed by the State's interest in enforcing a validly imposed sentence of death.

In *Turner v. Safley*, ___ U.S. ___, ___, 107 S.Ct. 2254, 2261 (1987), this Court held that a prison regulation which interferes with prisoners' constitutional rights is valid as long as "it is reasonably related to legitimate penological interests." Although the *Turner* standard of review is stated in terms of prison "regulations," this Court has noted that the standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Harper*, ___ U.S. at ___, 110 S.Ct. at 1038. Thus, even assuming that Perry retains a right to refuse medication under either the Due Process Clause or Louisiana law, the court order

²²Perry contends that Section 830.1 creates a constitutionally protected entitlement because it is "written in mandatory language." Brief for Petitioner at 42. Specifically, Perry points out the following language in Section 830.1: "If treatment for a longer period is deemed necessary, a *petition shall be filed* in a court of competent jurisdiction setting forth the reasons for the treatment. . . . After a hearing . . . , *the court shall determine* whether the inmate is competent and, if not, *he shall order* that appropriate treatment be provided." La. R.S. 15:830.1A (emphasis added). However, this language is not relevant to the issue of whether Section 830.1 creates a liberty interest in refusing medication. As explained by this Court in *Kentucky Department of Corrections v. Thompson*, ___ U.S. ___, ___, 109 S.Ct. 1904, 1910 n.4 (1989), "the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [sic] an inmate may be deprived of the particular interest in question." The language relied on by Perry does not *require* that medication be ordered if an inmate poses a danger to himself or others; the quoted language comes into play only *after* an initial decision has been made to medicate the inmate for fifteen days. In addition, the quoted language does not prohibit medication under other circumstances. Thus, the language is "irrelevant mandatory language." *Id.* at ___, 109 S.Ct. at 1910-11 n.4.

authorizing nonconsensual medication to achieve Perry's competency to be executed is valid because it is reasonably related to the State's interest in carrying out the death penalty.

In *Harper*, this Court considered a constitutional challenge to a Washington prison regulation which provided for forcible treatment of mentally ill prisoners with prescribed antipsychotic drugs if the prisoners were found likely to harm themselves or others. While recognizing a constitutional liberty interest in refusing unwanted medication, the Court applied the *Turner* standard of review and upheld the regulation as reasonably related to legitimate penological interests. *Id.* In so holding, the Court considered three factors which the *Turner* decision identified as relevant to the determination of the reasonableness of a regulation:

'First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it.' 482 U.S., at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, a court must consider 'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.' 482 U.S., at 90. Third, 'the absence of ready alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials 'have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' *Id.*, at 90-91; see also *Estate of Shabazz*, *supra*, at 350.

Id.

Consideration of the three *Turner* factors supports a conclusion that nonconsensual medication of a death row inmate to achieve competency for execution is constitutionally permissible. First, it is manifest that the State has a substantial interest in enforcing criminal sentences. See Brief for Petitioner at 44. The fundamental purposes of punishment, retribution and deterrence, cannot be served if criminal sentences are not carried out. In addition, as in *Harper*, the State has an interest in providing prisoners with treatment which is in their best medical interest. *Harper*, ___ U.S. at ___, 110 S.Ct. at 1039. The provision of medically prescribed treatment to a mentally ill prisoner to achieve his competency to be executed serves both of these State

interests. The medication makes it possible for the State to enforce a validly imposed death sentence. Moreover, "the fact that the medication must first be prescribed by a psychiatrist . . . ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Id.* at ___, 110 S.Ct. at 1037 (footnote omitted).

Second, under the circumstances, accommodation of the right to refuse medication would impose a significant burden on the prison system. Supervision and care of untreated mentally ill prisoners is considerably more difficult than supervision and care of mentally ill prisoners who are properly treated. As explained by the American Psychiatric Association and the Washington State Psychiatric Association, "[m]aintaining a significant number of unmedicated patients may impose considerable burdens on the staff in caring for the refusing prisoner and others whose treatment programs break down. These burdens, in turn, carry unfortunate consequences for recruiting and keeping staff of a consistently high quality." Brief for the American Psychiatric Association *et al.* at 21 n.17, *Harper*, ___ U.S. ___, 110 S.Ct. 1028. In addition, prohibition of involuntary medication would make claims of incompetency more inviting by granting incompetent prisoners an absolute reprieve from execution; such an approach would likely encourage death row inmates to feign incompetency. See *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting).

Third, when an incompetent death row inmate refuses treatment, there is *no* alternative to medication which will serve the State's interest in carrying out the inmate's sentence. The right to refuse medication is thus tantamount to the power to circumvent the death penalty. In this case, the evidence is undisputed that Perry will not remain competent for execution unless he is maintained on Haldol. Consequently, without the right to treat Perry, the State cannot enforce his sentence of death.

In sum, nonconsensual medication of Perry is reasonably related to the State's legitimate penological interest in enforcing the death penalty. Such medication is also reasonably related to the State's interest in providing Perry with treatment which is in his medical interest. As a result, the medication is permissible under the Fourteenth Amendment.

IV. The state court's conduct of adversarial hearings on the issue of competency, accompanied by the full panoply of attendant procedural protections, exceeded the requirements of the Due Process Clause of the Fourteenth Amendment.

Assuming *arguendo* that he has a protected interest in refusing medication, Perry has two liberty interests which were at stake in the post-conviction proceedings: the Eighth Amendment right to avoid execution during incompetency and the right to refuse medication. Both rights hinge on the determination of competency; if Perry is competent, he may be executed, and, if Perry is incompetent, he may be treated against his will with antipsychotic medication to achieve competency. The Due Process Clause thus requires that Perry be afforded procedures adequate to ensure that the competency determination is neither arbitrary nor erroneous.

This Court's decisions in *Ford* and *Harper* are instructive as to the procedures due Perry under the Fourteenth Amendment. In *Ford*, this Court held that the Florida procedure for determining competency for execution did not provide for a full and fair hearing under 28 U.S.C. §2254. Justice Marshall's plurality opinion identified three defects in the Florida scheme: "failure to include the prisoner in the truth-seeking process," 477 U.S. at 413, "denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," *id.* at 415, and "placement of the decision wholly within the executive branch," *id.* at 416. While Justice Marshall indicated that "a full trial on the issue of sanity" is not necessary, he stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible" and that "the manner of selecting and using the experts responsible for producing that 'evidence' [should] be conducive to the formation of neutral, sound, and professional judgments." *Id.* at 416-417. In a concurring opinion, Justice Powell noted that the issue of whether the state fact-finding procedure amounted to a full and fair hearing under 28 U.S.C. §2254 was identical to the procedural due process issue. *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Although Justice Powell did not determine "the precise limits that due process imposes in this area," he stated that "the requirements of due process are not as elaborate as Justice Marshall suggests." *Id.* at 425, 427. He

concluded that, in general, only an impartial decisionmaker and an opportunity to be heard are constitutionally required. *Id.* at 427. Justice O'Connor, concurring in the result in part and dissenting in part, reasoned that "the Due Process Clause imposes few requirements on the States in this context." *Id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). She nevertheless found the Florida procedure invalid because it failed to provide the prisoner with an opportunity to be heard. *Id.* at 430.

In the *Harper* case, as noted above, this Court considered a due process challenge to a Washington prison regulation providing for forcible medication of mentally ill prisoners who pose a danger to themselves or others. The challenged policy allowed nonconsensual medication of an inmate only after an adversary hearing before a special committee composed of a psychologist, a psychiatrist and the associate superintendent of the treatment facility. ____ U.S. at ____, 110 S.Ct. at 1033. The policy afforded the prisoner the rights to notice, attendance at the hearing, presentation of evidence, cross-examination of witnesses, assistance of a lay advisor and judicial review. *Id.* at ____, 110 S.Ct. at 1033-34. This Court upheld the policy's procedures as adequate under the Fourteenth Amendment. *Id.* at ____, 110 S.Ct. at 1040. Specifically, the Court rejected claims that due process requires a judicial decisionmaker, right to counsel, application of the rules of evidence, or proof by "clear, cogent and convincing" evidence. *Id.* at ____, 110 S.Ct. at 1042, 1044.

The procedures used by the state court in determining Perry's competency far exceeded the requirements of the *Harper* and *Ford* decisions. The competency determination was made by a judicial decisionmaker after adversary hearings and was subjected to appellate review. Perry was allowed to recommend appointments to the sanity commission, and his recommendations were honored. (R. 19; J.A. 46). Throughout the proceedings, Perry was represented by counsel. (J.A. 45-51). He was afforded the rights to be present at the hearings (J.A. 47, 50), to testify in his behalf (J.A. 95-97), to cross-examine witnesses (*see, e.g.*, R. 722), to compel production of documents (J.A. 46), to videotape the proceedings (J.A. 47), to present evidence (J.A. 125; R. 539-40, 542-45), and to submit written memoranda and oral argument (*see, e.g.*, R. 691, 763, 766). In short, the state court conducted a full-scale competency trial; it is

inconceivable that due process requires more.

Perry nevertheless asserts that the competency proceedings were constitutionally deficient in two respects. First, he complains that the court admitted into evidence the documents submitted by the Department of Public Safety and Corrections. (J.A. 99-106). According to Perry, because the documents were submitted *ex parte* and contain hearsay, their consideration by the court amounts to a denial of due process. Second, Perry insists that his due process rights were violated because the trial court failed to comply with procedures required by Louisiana law. Both of these complaints are meritless.

In *Harper*, this Court rejected an argument that a pre-hearing meeting between the special committee and the treatment facility staff, conducted without the inmate's presence, violated due process. The Court explained that "[a]bsent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing [the inmate] to contest the [state's] position at the hearing satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Harper*, ___ U.S. at ___, 110 S.Ct. at 1044 (citation omitted). Similarly, in this case, Perry cannot show that he was prejudiced by the *ex parte* submission of the challenged documents. The documents were submitted to the court in early June of 1988. (J.A. 99). By the end of that month, at the latest, Perry's counsel was aware of the Department's submission of the documents. (R. 194-97). In August of 1988, the court ordered the documents admitted into evidence. (J.A. 48). Subsequently, the court conducted two evidentiary hearings at which Perry had the opportunity to contest the evidence. Indeed, at the conclusion of the October hearing, the Court specifically offered Perry's counsel the opportunity to present evidence. (J.A. 125). Under the circumstances, Perry cannot claim that he was prejudiced, or even inconvenienced, by the short delay in notifying him of the documents' submission. Perry simply cannot now complain because he neglected to refute record evidence of which he was aware for several months.

Perry's objection to the hearsay nature of the evidence is likewise unfounded. Perry points to no authority for the proposition that the hearsay prohibition is constitutionally required in competency proceedings. Neither *Ford* nor *Harper* suggests such a

requirement. In *Harper*, this Court explicitly rejected the argument that application of the rules of evidence was constitutionally required. ___ U.S. at ___, 110 S.Ct. at 1044. In addition, the plurality opinion in *Ford* stressed that "the adversary presentation of relevant information [should] be as unrestricted as possible." 477 U.S. at 417. Certainly, Perry cannot claim that the documents in question were not relevant. Moreover, given the medical nature of the competency determination, the inmate's interests are better protected by considering "the realities of frequent and ongoing clinical observation by medical professionals," *Harper*, ___ U.S. at ___, 110 S.Ct. at 1042, than by formal adherence to the rules of evidence. In fact, Perry himself offered six volumes of hearsay medical records at the first hearing. (R. 539-40). Finally, because Perry was given an unfettered opportunity to contest the evidence, he cannot assert that he was prejudiced by its admission.

Perry's second complaint is that the state court failed to comply with procedures required by Louisiana law. However, Perry does not identify any specific deficiencies in the state court procedure. Moreover, a state's failure to follow its own procedures is not a violation of due process; "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12. This Court rejected an identical argument in *Olim v. Wakinekona*, 461 U.S. 238 (1983):

Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Id. at 250-51 (footnote and citations omitted). See also *Hewitt*, 459 U.S. 460. Thus, the State's compliance or noncompliance with its own procedural requirements is irrelevant to the constitutional issues before this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIXES

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- APPENDIX A Excerpts From Record
- APPENDIX B Louisiana Code of Criminal Procedure, Title XXI, Chapter 1, "Mental Incapacity to Proceed"
- APPENDIX C Louisiana Revised Statutes, Title 28, Sections 2 and 171
- APPENDIX D Louisiana Revised Statutes, Title 15, Section 830.1
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- APPENDIX F States Which Authorize Treatment or Stay or Suspend Execution Until Competency Is Regained
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- APPENDIX H Death Penalty States Which Involuntarily Treat Criminal Defendants in Other Contexts
- APPENDIX I Non-Death Penalty Jurisdictions Which Involuntarily Treat Criminal Defendants in Other Contexts
- APPENDIX J States Which Statutorily Provide That Competency to Stand Trial May Be Achieved Through Treatment

APPENDIX A**EXCERPTS FROM RECORD****LETTER TO JUDGE HYMEL FROM****KEITH B. NORDYKE****[RECORD—P. 19]****Nordyke and Denlinger***Attorneys at Law*

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January 20, 1988

The Honorable L. J. Hymel, Judge

19th Judicial District Court

Parish of East Baton Rouge

222 St. Louis Street

Baton Rouge, LA 70801

Re: State of Louisiana v. Michael Owen Perry

Dear Judge Hymel:

You have asked the defense to submit names of persons who the defense would like to nominate to the sanity commission in the above captioned. To that end, the defense would nominate as a psychiatrist qualified to serve on the sanity commission Dr. Glen Estes, Suite 3, 4521 Jamestown Avenue, Baton Rouge, Louisiana, telephone (504) 927-3062.

As I stated in open court, Dr. Curtis Vincent, a psychologist practicing in Baton Rouge, did extensive workups on Mr. Perry while Michael was at Feliciana Forensic Facility. As the 1987 legislature amended the Code of Criminal Procedure to allow psychologists to sit on sanity commissions I think it would be appropriate for Dr. Curtis Vincent to be appointed especially in light of his familiarity with this case. I therefore nominate as the psychologist member of this panel

4a

Dr. Curtis Vincent, 5000 Constitution Avenue, Baton Rouge, Louisiana, telephone (504) 928-6460.

Please advise if there is anything further that we can do to assist the court in this regard.

Very truly yours,

NORDYKE AND DENLINGER
/s/ Keith B. Nordyke
KEITH B. NORDYKE

* * *

5a

**EXCERPT FROM MEMORANDUM IN SUPPORT OF
STATE'S MOTION TO DISQUALIFY
KEITH NORDYKE AS COUNSEL OF RECORD IN
THESE PROCEEDINGS AND AS "DO-GOODER" FOR
MICHAEL OWEN PERRY**

[RECORD—P. 91]

* * *

The State * * * did not receive from defense counsel, a copy of Mr. Nordyke's March 14, 1988 letter (attached as App. F) to the Warden of the Louisiana State Penitentiary. Mr. Nordyke's letter instructed the warden to discontinue, the administering of any and all psychotropic medication to Michael Owen Perry: including but not limited to the medication ordered by medical doctors under whose care Michael Perry was placed.

* * *

[RECORD—P. 184]
Nordyke and Denlinger
Attorneys at Law
 228 Napoleon
 Baton Rouge, Louisiana 70802

Keith B. Nordyke
 June E. Denlinger

Telephone
 (504) 383-1601
 Mailing Address
 P. O. Box 237
 Baton Rouge, LA 70821

March 14, 1988

Warden
 Angola State Penitentiary
 Angola, LA 70775

Re: Michael Owen Perry
 (Death Row)

Dear Warden:

* * *

Pursuant to that decision making authority that has been delegated to me, I hereby request that Michael Owen Perry be removed from any and all psychotropic medication including but not limited to Haldol and Prolixin, which may currently be administered to Mr. Perry. This medication shall not be given to Mr. Perry until such time as I specifically concur or of course, a court orders otherwise. Mr. Perry is totally incompetent and unable to make decisions on his own behalf. He is currently undergoing evaluation by numerous doctors. I deem it in Mr. Perry's best interests not to be taking medication at this point in time. I have carboned a copy of this letter to the hospital at Angola and request that same be placed clearly in Mr. Perry's chart.

* * *

[RECORD—P. 186]

* * *

EX PARTE MOTION FOR DELEGATION OF DECISION MAKING AUTHORITY

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry, an incompetent death row inmate, who respectfully suggests to the Court through his undersigned counsel the following:

1.

Undersigned counsel visited with Perry on January 6, 1988, at the hospital at Louisiana State Penitentiary. Michael was blatantly psychotic, unable to articulate any facts regarding his case cogently and was completely incapable of making decisions on his own behalf.

2.

It is anticipated during the course of the representation of Mr. Perry for purposes of the "Perry Motion" that there will be certain issues raised, such as the ability to waive the attorney client privilege, whether to abandon defenses or not, and whether or not Perry himself should be an exhibit or attempt to testify. Counsel believes Perry to be totally incapable of making these decisions for himself.

3.

On January 15, 1988, undersigned counsel contacted Mr. Tom Collins, executive counsel of the Louisiana State Bar Association, in an attempt to obtain ethical guidance and in particular, interpretation of Rule 1.14 of the Louisiana Code of Professional Responsibility. Rule 1.14 (copy attached) asserts that the attorney must "take other protective action as may appear appropriate under the circumstances" [when his client is under a disability and unable to make decisions]. Mr. Collins stated that the committee would not be able to provide an ethical opinion or guidance on this issue and that counsel should proceed under existing procedural or substantive law.

[RECORD—P. 187] 4.

Although Rule 1.14 suggests the possibility of a curator, it is clear that that portion of Rule 1.14 is dealing with civil matters. Counsel does not believe there is any authority for a curator to make decisions

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in criminal cases on behalf of his client and further, does not believe that such decisions should or can be made by a curator.

5.

It is anticipated that expert psychiatric testimony in this cause will show that the decision making processes of the defendant are so impaired as to render them completely unreliable.

6.

Counsel represents to the Court that there are no close family relatives available to appoint to make decisions on behalf of Mr. Perry and further, even if such relatives were available, they would not be eligible for appointment due to the nature of the crime accused in this matter.

7.

Counsel desires to undertake to make these decisions on behalf of Mr. Perry, keeping Mr. Perry's best interests at heart at all times, in order that adequate representation might be given. Other than "a Motion to Appoint a DoGooder" counsel knows of no other method to adequately protect Mr. Perry's rights and to competently and timely exercise the decision making that must be done in this case.

8.

Movers desire that this motion be kept under seal and that any hearing held in this matter be held in chambers ex parte.

9.

Counsel certifies that they have read the appropriate rules of professional responsibility and there is no guidance other than what is attached.

10.

In the alternative, mover desires that an experienced criminal lawyer, who has practiced in the field of death penalty [RECORD—P. 188] defense, be appointed to make decisions on behalf of Michael Owen Perry and undersigned counsel would be happy to provide the Court with a list of such persons in the Baton Rouge area.

WHEREFORE, MOVER PRAYS that after due proceedings had, there be a hearing in chambers, ex parte, and any record thereof be kept under seal, and that Michael Owen Perry be allowed to make de-

9a

cisions through counsel or by a representative to be appointed from the Criminal Bar of the City of Baton Rouge who has experience in death penalty defense.

MOVER FURTHER PRAYS for a general and equitable relief as may be allowed by law.

BY ATTORNEYS:

/s/ June E. Denlinger
KEITH B. NORDYKE
JUNE E. DENLINGER
228 Napoleon
Baton Rouge, LA 70802
Phone: (504) 383-1601

* * *

**LETTER TO JUDGE HYMEL FROM
KEITH B. NORDYKE**

[RECORD—P. 193]

Nordyke and Denlinger

Attorneys at Law

228 Napoleon

Baton Rouge, Louisiana 70802

Keith B. Nordyke
June E. Denlinger

Telephone
(504) 383-1601
Mailing Address
P. O. Box 237
Baton Rouge, LA 70821

June 22, 1988

Honorable L. J. Hymel
Judge
19th Judicial District Court
222 St. Louis Street
Baton Rouge, Louisiana 70801

Re: *State of Louisiana v. Michael Owen Perry*
Number: 9-85-472

Dear Judge Hymel:

I enclose herewith an objection to additional evidence which has been attached to various state briefs in this matter. I understand Your Honor does not want this matter being set for hearing therefore, we would appreciate this objection being filed into the record so that our rights for appellate review are reserved if necessary.

Thanking you for your cooperation and attention, we remain

Very truly yours,

NORDYKE AND DENLINGER
/s/Keith B. Nordyke
KEITH B. NORDYKE

[RECORD—P. 194]

**OBJECTION TO AMICUS BRIEF AND OBJECTION TO
INTRODUCTION OF ADDITIONAL EVIDENCE**

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who respectfully objects to the filing of an amicus brief by the State of Louisiana and to the objection of additional evidence for reasons set forth below:

1.

Mover would object to the amicus brief filed on behalf of the State of Louisiana (Department of Corrections) for the reason that the Department of Corrections has no interest in this matter and no cognizable standing to file an amicus brief. Further, Michael Owen Perry perceives an amicus brief by *the state* as merely an attempt to get a "second bite of the apple". There is no showing anywhere that the Attorney General's office is not sufficiently motivated or prepared to handle this case. In other words, it seems that "the state is the state" and that an additional opportunity to file a brief is being given the state by use of an amicus brief.

2.

Attached to the amicus brief and further, attached to the state's original memorandum in this matter, is evidence adduced after the trial of this matter held in April, 1988. Michael Owen Perry vigorously objects to the introduction of this evidence for numerous reasons including but not limited to the following:

1. The evidence is hearsay;
2. The evidence was not taken subject to cross examination
3. The evidence purports to be opinion testimony however no qualification of the expert has been had, and Michael Owen Perry believes that the physicians in this matter are the best experts.
4. Michael Owen Perry has been denied due process as defined in *Ford v. Wainwright* in that the introduction of this evidence completely denies Michael Owen Perry an opportunity to respond and to be heard.
5. Any evidence obtained from Michael Owen Perry in addition to being uncross-examined, was in violation of his right to coun-

sel in that said evidence was taken [RECORD—P. 195] from Michael Owen Perry while he was either incompetent or without the advice of his counsel and certainly without the knowledge of his counsel both in violation of the Fifth and Sixth Amendments to the United States Constitution.

3.

For the above and foregoing reasons and based on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Louisiana Constitution plaintiff objects to the introduction of any additional evidence.

WHEREFORE MOVER PRAYS that all evidence filed and not connected with the trial of this matter and subsequent to the trial of this matter be stricken and not considered.

BY ATTORNEYS:

/s/ Keith B. Nordyke
KEITH B. NORDYKE
NORDYKE AND DENLINGER
P. O. Box 237
Baton Rouge, Louisiana 70821
Telephone: (504) 383-1601

* * *

[RECORD—P. 196]

* * *

OBJECTION TO INTRODUCTION OF ADDITIONAL EVIDENCE

NOW INTO COURT, through undersigned counsel, comes Michael Owen Perry who objects to the introduction of evidence subsequent to the close of the hearing for reasons set forth below:

1.

Mover understands however has not been favored with a service copy of certain evidence which has been forwarded to the trial court in this matter subsequent to the close of the hearing on April 20, 1988.

2.

In particular, mover has been made aware of a June 7, 1988 letter from Annette Viator, attorney for the Department of Corrections, to the Honorable L. J. Hymel, forwarding certain documentation from the Louisiana State Penitentiary to the trial court.

3.

Furthermore, these documents, which are not introduced into evidence, and have not been subjected to cross examination had been attached to the state's brief in this cause.

4.

The aforereferenced June 7, 1988 letter indicates that a physician at Louisiana State Penitentiary will be following up with weekly reports to Your Honor and mover would respectfully and vigorously object to this procedure as evidence has been taken in this matter and the case has been taken under advisement.

5.

This procedure completely and totally violates defendants rights in this cause as these witnesses were not called by the State of Louisiana at the hearing in this matter (when the state [RECORD—P. 197] had total opportunity to do so) and these documents attempting to be introduced in this fashion solely in an effort to circumvent cross examination and normal evidentiary procedure.

The aforementioned procedure is violative of Michael Owen Perry's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as all Louisiana corresponding constitutional provisions in that the documents submitted in the aforementioned fashion have not been tested by cross examination, have not been subjected to scrutiny by counsel, have not been served upon counsel, afford no notice and opportunity to be heard and appear to be derived from Michael Owen Perry without the benefit and advice of counsel.

WHEREFORE MOVER PRAYS that after due proceedings had mover prays that the State of Louisiana be prohibited from introducing any further evidence after 20 April 1988 and further, that all such documentation submitted after 20 April 1988 be stricken from the record.

MOVER FURTHER PRAYS that the State of Louisiana be ordered and prohibited from further attempts at providing documentation to this Court without:

- a. Forwarding a copy to opposing counsel.
- b. Noticing a hearing and producing the witnesses and the opportunity to be heard.

BY ATTORNEYS:

/s/ Keith B. Nordyke
 KEITH B. NORDYKE
 NORDYKE AND DENLINGER
 P. O. Box 237
 Baton Rouge, Louisiana 70821
 Telephone: (504) 383-1601

**LETTER TO ANNETTE VIATOR FROM
 KEITH B. NORDYKE**

[RECORD—P. 204]

Nordyke and Denlinger

Attorneys at Law

228 Napoleon

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Keith B. Nordyke
 June E. Denlinger

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 Mailing Address
 P. O. Box 237
 Baton Rouge, LA 70821

June 22, 1988

Ms. Annette Viator
 Department of Corrections
 P. O. Box 943-4
 Baton Rouge, Louisiana 70804

Re: Michael Owen Perry

Dear Annette:

* * *

As attorney for Michael Owen Perry I would respectfully request at this time that all medication to Michael Owen Perry be discontinued until such time as the state has complied with the statutory procedures set forth in Title 15 of the Louisiana Revised Statutes.

* * *

16a

[RECORD—P. 305]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
John A. Dixon, Jr.

Associate Justices
Pascal F. Calogero, Jr.
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Luther F. Cole

Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112
Telephone 504-568-5707

August 29, 1988

Hon. L. J. Hymel
Judge, 19th Judicial District Court
222 St. Louis St.
Baton Rouge, LA 70801

Re: No. 88-KD-2239

State of Louisiana vs. Michael Owen Perry

Dear Judge Hymel:

This is to advise that the Court took the following action, this date, in the above entitled matter:

"The order of the trial judge dated August 26, 1988 in the minutes of court requiring forced medication of defendant pending the hearing on September 30, 1988 is stayed pending orders of this Court."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
FRANS J. LABRANCHE, JR.
Clerk of Court
* * *

17a

[RECORD—P. 314]
Supreme Court
STATE OF LOUISIANA
New Orleans

Chief Justice
John A. Dixon, Jr.

Associate Justices
Pascal F. Calogero, Jr.
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
Harry T. Lemmon
Luther F. Cole

Clerk of Court
Frans J. Labranche, Jr.

301 Loyola Ave., 70112
Telephone 504-568-5707

September 23, 1988

Hon. L. J. Hymel
Judge 19th JDC
222 St. Louis Street
Baton Rouge, La. 70801

In Re: *State of Louisiana vs. Michael Owen Perry*
No. 88-KD-2239

Dear Judge Hymel:

This is to advise that the Court took the following action on September 22, 1988 with regards to the above entitled matter:

"Relator's motion to stay the September 30, 1988 hearing is denied."

With kindest regards, I remain,

Very truly yours,

/s/ Frans J. Labranche, Jr.
FRANS J. LABRANCHE, JR.
Clerk of Court
* * *

**EXCERPTS FROM SANITY HEARING HELD
APRIL 20, 1988**

[RECORD—P. 505]

* * *

MR. NORDYKE: Dr. Jimenez, if you will please take the stand so we can get you out of here.

* * *

[RECORD—P. 509] [EXAMINATION OF DR. THERESITA JIMENEZ]

* * *

Q Dr. Jimenez, you were appointed by Judge Hymel to examine Mr. Michael Owen Perry, were you not?

A Yes, sir.

Q And, of course, you're familiar with Mr. Perry because you were, I believe, his treating physician in the Feliciana Forensic in '83 and '84?

A That's right, sir.

Q And I believe you were also the medical director or the psychiatric director of Feliciana Forensic during those years, were you not?

A Yes, sir.

Q Okay. And on February 4th of 1988 I believe you went to Louisiana State Penitentiary at Angola and evaluated Mr. Perry, is that correct?

A Yes, sir.

* * *

[RECORD—P. 511] I feel that Mr. Perry will become competent with the proper medication adjustment. He does understand that he is convicted and also expressed that he does not want to die.

Q What facts went into that opinion, doctor?

A When I went to see Mr. Perry that day he was fairly cooperative but he was evasive with the type of answers and mood that he was in. He indicated at the first part of the interview that he didn't kill the people that were killed, that somebody else did it. At a later part of the

interview he accepted that he did it because he had a lot of anger towards his mother. So the information he was giving at that point was rather inconsistent. He also talked about his lawyer had not defended him very well because he was a member of the Mafia. And he was very inconsistent with information that he was giving. He was—I also felt at that time that if we could readjust the medication that we would be able to get him much better.

Q I believe you've diagnosed Mr. Perry as having Schizoaffective Disorder, is that correct?

A That's correct, sir.

Q Would you please tell the judge what Schizoaffective Disorder is and what the symptoms of Schizoaffective Disorder may be, including the bipolar nature and that sort of thing?

A Schizoaffective Disorder is an illness wherein the patient has a problem with thinking disorder and at the same time also a problem with his feeling tone or the defective [sic] component. When they are in the state of acute illness they **[RECORD—P. 512]** usually are very manic if they are in a manic phase and very paranoid. Now if they are also in the depressed state they could be very withdrawn and would manifesting symptoms like not wanting to sleep, not wanting to talk or having crying adversity. The problem is also that they would have some distortion in their thinking and that would be the Schizophrenic component of the illness.

* * *

[RECORD—P. 513] Q Dr. Jimenez, my first interest is you have previously, have you not, diagnosed Michael Perry as being Schizoaffective Disorder?

A Yes, sir, I did.

Q And do you classify that as a major mental illness?

A Yes, sir.

Q Okay. And can that be acute at times and disappear and fade out at other times?

A The symptoms would get better at some point but the illness would be there. It has to be controlled by medication.

* * *

[RECORD—P. 514] Q All right. Now you mentioned that this is a thinking disorder. Can you give me some examples of how this thinking disorder would affect any one of us? I mean how would it make our lives different having a thinking disorder labeled as you have Schizoaffective Disorder?

A Well, if you have problems with thinking disorder there are times wherein you would not be in touch with reality when you are acutely ill, and there are times when you would feel like people are out to get you or people are out against you. And that would be the paranoid component of the illness. And . . .

Q And if—go ahead.

A Sometimes you would think that you are somebody that you really are not. And that's like when you think you are God.

Q Okay. Now if you think people are out to get you when they're not is there a label that psychiatrists attach to that phenomena?

A Paranoia.

Q And do you conclude that paranoia is an element of a Schizoaffective Disorder?

A It's a part of the problem but some people can also be paranoid without being Schizophrenic.

* * *

[RECORD—P. 515] A * * * Sometimes, also, he rambles. His thinking is not cohesive. He would go from one topic to the other and there is very loose association.

Q Did you say good or bad association or disassociation?

A Loose, loose.

Q Loose associations. And how do you determine a loose association?

A A loose association, uh, you would note when you are talking to a person and the answers that they give you are—or when they give you information there is no cohesiveness or they just don't stick together.

* * *

[RECORD—P. 518] BY THE COURT:

Q Dr. Jimenez, while you're looking for that, when you examined him on February 4th of this year at my request do you know whether or not Mr. Perry was on medication then?

A Yes, sir, he was on medication, a small amount of medication, but he was not taking it regularly.

Q What type of medication and what dosages?

A Haldol, and I think he was taking ten milligrams of Haldol.

Q Is that a daily prescription?

A Yes, sir, he had often times refused it. In fact, at that time that I saw him I think he was just restarted or he had just started agreeing to take the medicine.

Q What kind of drug is Haldol and what is its purpose and what does it do and what affect, in your opinion, did it [RECORD—P. 519] have and does it have on Michael Owen Perry?

A It's a psychotropic medication. It's supposed to get the thinking process more delusiveness, more cohesive, less paranoia, and get him to be able to concentrate and participate in the interviews, make him less paranoid. It's supposed to help his illness get better. That's the purpose of keeping him on the medication. At one time he was also tried on Lithium Carbonate but he did not do too well and he developed too many side effects so that was discontinued.

* * *

Q Do you know of your own knowledge or have you reviewed the report showing when he was placed on the Haldol?

A I was the one who started that on him back when he—when he first arrived he was doing well. And at that time I didn't feel that he was having any mental illness because he was really—other than being hostile and uncooperative [RECORD—P. 520] at that time. We did not then put him on any medication, really just tried to observe him and referred him for some testing which was done. And then his behavior became worse and he was very hard to deal with and he was causing a lot of—making a lot of threats so he was started on medication. He did better after that but then we had problems also with the side effects so we pretty much had to readjust his medicine regularly and watch him closely. He also has a problem about wanting to take

medication. He really never was interested in taking medication.

* * *

[RECORD—P. 534] Q Dr. Jimenez, does Mr. Perry have a different diagnosis or prognosis after your February 4th, 1988 interview as opposed to your interviews and observations prior to trial? Have you detected any different symptoms in your February 4th, 1988 interview as opposed to what you observed and saw prior to his trial?

A No, sir.

* * *

[RECORD—P. 539] MR. NORDYKE: Now that we're back on record, Your Honor, in connection with this proceeding I would offer, introduce and file into evidence, into evidence as Exhibits Two, Three and Four various medical records, the originals of which I'll be putting into evidence, copies of which I have provided to everybody, including the physicians in this case in bound format.

THE COURT: Which volumes [RECORD—P. 540] are those?

MR. NORDYKE: It varies. Exhibit Two, Your Honor, corresponds with volume six. This is the Lake Charles Mental Health records.

* * *

[RECORD—P. 542] THE COURT: Let it [Exhibit Two] be filed.

* * *

[RECORD—P. 543] THE COURT: Which are the Feliciano Forensic documents. The Court will allow them [Exhibit 3] to be filed as such.

* * *

[RECORD—P. 544] THE COURT: Let them [Exhibit 4] be filed as marked.

* * *

MR. NORDYKE: And, D-5 will be the Angola records

* * *

[RECORD—P. 545] THE COURT: Let that be filed as Exhibit Five.

MR. NORDYKE: And we will supplement the record with that at

the next break. We will call Dr. Aris Cox, please.

* * *

[RECORD—P. 546] [EXAMINATION OF DR. ARIS COX]

Q You are one of Mr. Perry's treating psychologists at Angola, are you not?

A No. I'm his treating psychologist [sic] at Angola, yes.

* * *

[RECORD—P. 552] A I have not noticed him to have any symptoms of tardive dyskinesia.

* * *

[RECORD—P. 553] A Well, there are medicines that can be given for side effects that improve the extra-parameatal symptoms, and also discontinuing neuroleptic medication can prevent it.

* * *

A I have seen him on and off medication several times now and I have seen him respond to medication. When I saw him [RECORD—P. 554] back on the 3rd of March he looked about as good to me then as I've ever seen him look. At that time I thought he probably was competent. He deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not. That's what I meant by that.

* * *

BY THE COURT:

Q Who made the decision, it you know, to place him on Haldol?

A One of the other psychiatrists there, a Dr. Jalisonne, and Dr. Montero has seen him also and they had put him on the medication.

* * *

Q * * * But my question is do you agree with [RECORD—P. 555] their . . .

A That treatment is a rational appropriate treatment for the psychiatric illness that this man has, in my opinion.

Q And does Haldol affect him beneficially?

A Yes, sir, when he takes it in adequate doses it affects him beneficially.

Q What is an adequate dose, in your opinion?

A Thirty milligrams a day, or more.

* * *

[RECORD—P. 559] Q * * * Could you give me your definition of Schizoaffective Disorder, please?

A It is a psychotic illness characterized by a mixture of symptoms which include mood swings, disorganized thought processes, and certain other symptoms, such as, fixed false beliefs, such as, delusions, response to non-existent stimuli, such as, hallucinations, and disorganized thinking.

Q You used another word on me in your definition that I want you to define for me and that is psychotic illness.

A Well, psychotic illness is generally accepted as being an impairment of mental functioning to such an extent that the person is unable to meet the ordinary demands of life, I believe the AMA says. And, also, that there specifically is meant that there contact or appreciation of external reality is impaired. They hear things that aren't there, they see things that aren't there, they misinterpret what goes on around them.

* * *

[RECORD—P. 561] A To me, the changes that have occurred in him, his response to medication has been valuable to me in reaching conclusions about him.

Q Explain to me why.

A Because he gets better when he takes medication and he gets worse when he doesn't. And I think this is indicative of the fact that he has a process going on that responds to the medication. And, secondly, I think argues against the fact that he's malingering because in my experience people who malingering tend to do it whether they're on medication or not.

* * *

[RECORD—P. 567] Q Now you mentioned to me also that there was neuroleptic medication?

A Yes, sir.

Q Could you give me a definition for that?

A Neuroleptic medications such as Haldol is the name applied to these medications which are given to people for certain psychiatric illnesses, and they basically suppress, control, or improve the symptoms of the illness.

Q Okay. And what illness is the specific case Mr. Perry endures?

A He's being given this drug because he has a diagnosis of [RECORD—P. 568] Schizoaffective Disorder.

Q And this neuroleptic drugs will suppress what particular symptoms of Schizoaffective Disorder?

A Makes his thinking become coherent and rational, it makes his delusional beliefs either go away or become much less compelling or controlling. If he's hallucinating it will suppress or cease the hallucinations, will make him less labile and agitated.

Q Okay, so you told me he would become passive, it will reduce his delusions . . .

A Not passive, but he will . . .

Q Less hostile?

A Less hostile, less aggressive, less bouncing around off the wall.

Q All right, so, what else do we have besides less hostile, and no delusions or reducing . . .

A Thinking more coherently, and more in contact with his environment.

Q More coherently means what?

A Well, more coherent means that he could sit down and give me—I could ask him a question and he can develop an answer and explain an answer to me in a logical fashion, carry out a discussion with me and string together three or four or five thoughts or concepts in a logical sequence that makes sense. If, for example, I ask him, for ex-

ample, tell me what happened when you were in the hospital last week, he's able to sit down and tell me what was going on, why they took him to the hospital, how long he was there, etcetera, etcetera, in a coherent fashion. When he's not on medication he rambles so that he goes from talking about the hospital to something that happened before he ever came to Angola, [RECORD—P. 569] to something else that is completely unrelated.

* * *

[RECORD—P. 571] A We were discussing the issue of the man's competency and I said it has to do with whether or not he's on medication or not. When he's on medication I think he's competent, when he's not I don't think he is. And he [Mr. Nordyke] was aware that Michael was being given medication at Angola and he was taking it. And he indicated to me the he was going to advise him to quit taking it or see to it that he stopped taking it.

* * *

[RECORD—P. 573] A Is a specific motor—there's two specific motor pathways in the nervous system, the parameatal and the extra-parameatal motor systems. They control motor movement and coordination. These drugs have affects on so-called extra-parameatal system and produce certain movement disorders in patients.

Q Extra-parameatal . . .

A Parameatal.

Q . . . parameatal means controlling motor movement?

A Yes.

Q And how does that relate to Mr. Perry?

A Well, it relates to Mr. Perry that he develops sometimes these symptoms when he is taking Haldol. These symptoms are a recognized side effect of this class of drug.

* * *

[RECORD—P. 574] A Do I think he has tardive dyskinesia now?

Q Yes.

A No, I do not think he has it now.

* * *

[RECORD—P. 579] MR. NORDYKE: Dr. Curtis Vincent, please.

* * *

[RECORD—P. 587] [EXAMINATION OF DR. CURTIS VINCENT]

Q What was your job at Feliciana Forensic Facility when you were there?

A It varied some over the years that I was there. For a while I was acting chief psychologist whenever I was hired in 1979 until I hired someone to be the chief psychologist there. Once I hired someone for that position I became a clinical psychologist simply working there in that position. Through those years more than anything else I was doing psychological evaluations of individuals to help determine competency to stand trial, sanity, competency for other issues. I also did some treatment, individual and group. I put together and managed a program to treat some of the patients who were there.

* * *

[RECORD—P. 589] Q Dr. Vincent, you were appointed by the Court to evaluate Mr. Michael Owen Perry with reference to his competency to be executed, were you not?

A Yes, I was.

Q And as I understand your report you went to Angola and evaluated him on March 5th of 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 590] He did indicate that he knew that he would be executed if he were found competent to proceed. * * * He was very tangential with me, that is, that as I asked him questions he would initially typically respond to that question very quickly, slight off the subject, and talked [RECORD—P. 591] about something completely irrelevant.

* * *

[RECORD—P. 592] Q Did Mr. Perry indicate to you that he was God?

A Yes, he indicated at least at one point that he was God.

Q What about his marital status?

A He told me that he had married a woman named Susan Bordon since being at Angola and that he was—well, he told me that he had married her. I didn't go into any further detail after that.

* * *

Q What about auditory hallucinations?

A He told me at that point that indeed he was hearing voices in his head talking to him and telling him various things. [RECORD—P. 593] And I asked him in particular what those were and very often they were profanities. And at one point he blurted out that the voice was saying, this person is innocent. He also indicated to me that he had been having auditory hallucinations at the time of the offense.

* * *

A I also evaluated him in 1983 at Feliciano Forensic

* * *

Q I believe in 1983 your diagnosis was that of Schizoaffective Disorder. Has that changed?

A I believe that the diagnosis stands today, the same diagnosis.

* * *

[RECORD—P. 594] A I'm assuming he was taking medication at that point.

Q Okay.

A The security guard said that he indeed had been taking medication and that the night lieutenant said that he had observed him taking medication. From my many years working in a psychiatric facility there are ways to put it in your mouth and not take it. I don't know that he was indeed taking it at that point. * * * [RECORD—P. 599] There are times when an individual can be administered medication and he can put it in his mouth but not swallow it. * * *

Q Do crazy people and not crazy people both fail [sic] taking medication?

A Yes, they do.

* * *

[RECORD—P. 615] Q All Right, so, this psychological screening

your conclusion was a psychotic disorder characterized by high level of suspiciousness, coupled with a tenuous grip on reality. I mean . . .

A That's one of my conclusions.

* * *

[RECORD—P. 616] Q What treatment would you suggest?

A With the psychotic thinking that I see in him as of March, uh, I think medication would be the primary treatment modality to use.

* * *

[RECORD—P. 626] Q Is it correct to say that your conclusion was that he had an understanding of the functions of the court?

A One of my conclusions was that he indeed understood the functions—many of the functions of the court and he understood the rule[sic] of the various members of the court, yes.

* * *

[RECORD—P. 628] Q All right. But you also say that he does understand the charges and did understand the results of being found competent and he does understand the courtroom (inaudible) if we may use that terminology for the functions of the different parties, correct?

A Yes, that's correct.

* * *

[RECORD—P. 629] A As of March 5th, as I indicated, he was very inconsistent in a number of areas but in particular regarding his actions at the time of the murders and around that time. And that was very inconsistent. He was also very tangential, he had some difficulty paying attention and as a result I would see his having some difficulty assisting in his defense today, for instance.

* * *

[RECORD—P. 634] MR. NORDYKE: Dr. Estes.

THE COURT: Dr. Estes, you have been called as the next witness.

[RECORD—P. 637] [EXAMINATION OF DR. GLEN ESTES]

* * *

Q Dr. Estes, you were appointed to evaluate Michael Owen Perry, were you not?

A That's correct.

Q And of the three persons that have preceeded you on the witness stand I believe you examined him latest in time, on March 9th, 1988, is that correct?

A That's correct.

* * *

[RECORD—P. 641] A He did not tell me that he was married to Suzanne Bordelon, he told me that he was married at age seven, however.

* * *

[RECORD—P. 643] Q You indicated that you wished to be relieved of any responsibility for treatment of Mr. Perry.

A That's correct.

Q Besides not functioning in a prison setting except at the request and volunteering to do it for the judge, would you pursuant to his request volunteer to do it? That is, treat Mr. Perry.

A No, I would not volunteer to do that.

* * *

[RECORD—P. 644] Q * * * tell me can you treat a man to make him sane so he can be executed?

A Can I . . .

THE COURT: That's not the issue before me today, Mr. Salomon. I'm not going to make him answer the question. The inquiry today is competency to be executed. Let's go forward.

Q Doctor, do you have any moral or ethical dilemmas presented in a case of this nature?

MR. NORDYKE: Same objection, judge.

THE COURT: That's not his decision to make, that's my decision if we ultimately get there, Mr. Salomon.

* * *

[RECORD—P. 649] Q How many times did you meet with Mr. Perry?

A Once.

Q For what period of time?

A About an hour.

* * *

[RECORD—P. 660] THE COURT: Let the record show the defendant is in court with counsel and the State is represented by the Assistant Attorney General. I spoke briefly with defense counsel in the hallway outside the courtroom and I was advised that the defendant will be called as a witness. The court reporter will, of course, attempt to make as best a transcript as she possibly can but in the event that that is not possible I understand that the Defense, and I'll ask the State, if you have any objection to submitting the defendant's testimony on the video tape itself. Mr. Salomon, would you have any objection to that? We're going to probably make a transcript but what I'm saying is it may not be possible. I don't know if it is or not but whatever we get I'm going to submit the video tape also. Any comments or thoughts or objections you have on that?

MR. SALOMON: Yes, judge, I'm going to object just because I'm not sure that's within court rules and permitted by the State Supreme [RECORD—P. 661] Court. And that's going to be my basis.

THE COURT: Your objection is noted and overruled. As I've said, the court reporter will attempt to make as best a transcript as possible but in the even she's not able to do so the Court will submit it to higher courts in the form of this video cassette. So, with that, do you want to call Mr. Perry?

MR. NORDYKE: We will call Mr. Perry as an exhibit.

THE COURT: If you would step up, please.

MR. SALOMON: As an exhibit or as a witness?

THE COURT: He's being called as a witness. If you would raise your right hand and be placed under oath, please.

* * *

[RECORD—P. 663] [EXAMINATION OF MICHAEL PERRY]

Q * * * A minute ago you told me you were ninety percent. What is that?

A Well, like I told the judge, and I didn't mean it, but I was struck by the voices, you know. * * * [RECORD—P. 667] Now the truth is is that the voices got me. I wanted to commit suicide the day before I committed five counts of murder. A lot of people saw me do that. A lot of kids learned that. One lady is dead. I want her alive. You said you'd do that. Now once those voices get you—I fought it for twenty years of solid pain. I said, no, I don't want to do that, that's begging. That's what they did to me, they begged me for ninety years. They took it. So I said, okay, I join. Then they killed me for twenty years. Ten years of that was pain, you know. So to answer your question, I didn't do it. But I know who did. But that's going to cost you twenty million dollars before I can answer your question

* * *

[RECORD—P. 670] Q When were you born, Michael?

A December 3rd, 1954.

Q And who were your parents?

A Chester Adam Perry.

Q And who was your mother?

A Eve, they said Eve. That's what I first heard. And they said—like I read the bible thirteen years, solid pain. Mr. Hymel was a witness to that, you know. I wish you would respect the man and give up, you know, let the man send me to Jackson and have all of that sex activity if that's what they want to do with me, finish it off, you know. Uh, Rene, I like you. I'm shocked to death that you become against me. Uh, I want to give you that but if you don't like it I'll double it. That's my life. I have the right to defend my life, you know. I didn't do it but I know who did. And but, you know, that's whenever it started on me, you know, that's whenever it started. That's between me and you, you know. You told me to say that last night. We met. I ain't going to lie about it, you know, because I'm in front of the microphone. That thing is a cobra. You can't fool me, you know. We spent twenty years together and you beat the hell out of me. That's a legal word to say. I don't know what happened to the camera but you said I'd be on camera but I don't—there it is right there. But anyway, uh, I mean I told you I'd tell you the truth, too, you know, because I like to have fun with you. Uh, I know [RECORD—P. 671] your wife. We met before. I don't know why she likes me, uh, she said ninety percent. I said a hundred per-

cent, you know. And so I'm guilty, you know, and I'll pay for it. And the world is going to double. But I was born December 3rd, 1954 and I'm nine percent crazy, that's the truth, that's forever. I'm nine percent crazy. And, uh, that medicine they put me on I'm going to have to file suit for ninety million years.

* * *

[RECORD—P. 691] THE COURT: The Court will take this matter under advisement. I will give Defense counsel * * * two weeks, to file any memorandum in support of your [RECORD—P. 692] position * * * You have until the 20th of May at 5:00 p.m. to file a response, Mr. Salomon, if you wish to do so. * * * I will rule on this case at 9:00 a.m., May 26th.

MR. SALOMON: And, Your Honor, uh, is there something special you wish to be addressed in this memoranda?

THE COURT: I think the issues that have been formed. I think all of you are familiar with the Perry case from the Supreme Court, the Ford versus Wainwright decision, the issue of—one issue raised by one of the witnesses today is whether or not the Court has the authority or whether or not a defendant has the right to refuse medication. That's an issue, also.

* * *

**EXCERPTS FROM PROCEEDINGS HELD
AUGUST 26, 1988**

[RECORD—P. 698]

THE COURT: * * * The first matter that the Court is going to address today is the defense objection to the Court considering these [RECORD—P. 699] weekly or monthly reports filed into the record of this case by the officials of the Department of Corrections. Those reports were filed at my request, or sent to this Court by my request. * * * [RECORD—P. 700] Next business before the Court is that the Court is, based on the weekly reports that I have received, I feel that there has probably been a change in the mental condition of the defendant, I am ordering Drs. Cox and Jimenez to re-examine the defendant relative to his competency as set up by the Louisiana Supreme Court in the original Michael Owen Perry decision. * * *

[RECORD—P. 701] THE COURT: We'll do this at 10:00 that morning, September the 30th at 10:00 a.m. And, of course, the defendant will be brought into court for the purposes of that hearing. Pending that hearing, pursuant to RS 15:830.1, the Court is ordering that the Department of Public Safety and Corrections provide treatment and medication to the defendant, as to be determined by the medical staff of the Department of Public Safety and Corrections.

* * *

**EXCERPTS FROM SANITY HEARING HELD
SEPTEMBER 30, 1988**

[RECORD—P. 712] THE COURT: * * * Dr. Jimenez is ill and will not be able to be here today, so we'll take her testimony at a later date. And at this [RECORD—P. 713] time, the Court will call Kovac as a witness. Step up, please.

* * *

[RECORD—P. 714] DR. KAY BRASIER KOVAC, called by the Court as a witness to testify herein, after being duly sworn, testified, as follows:

* * *

A My name is Kay Brasier Kovac, I'm currently employed at Louisiana State Penitentiary, Angola. I have been medical director there since October of 1985.

* * *

[RECORD—P. 722] THE COURT: Okay, I'll let Defense counsel question Dr. Kovac. Which one of you wants to question her?

MR. NORDYKE: I'll take it, Your Honor.

* * *

[RECORD—P. 724] Q And, in fact, Michael's affect and delusional status can vary from day to day, can it not?

A It depends on—just in my limited experience with Michael, it depends on whether he had taken his medication.

Q But it does vary from day to day?

A Well, just using this example—this week as an example it hasn't varied, you know, what I saw Monday was the same as I saw yesterday.

Q That's because you gave him—that's because he was given a shot of Haldol-D on September 3rd?

A That's correct, because he had his medication.

* * *

[RECORD—P. 731] Q And in your administrative managerial capacity, as a supervising physician at the Angola State Hospital, did you

see some correlation between the acceptance of medication and this behavior you described as being acutely psychotic?

[RECORD—P. 732] A When Michael has not taken his medication he's had—you know, gone into these episodes.

[RECORD—P. 735] THE COURT: Let the record show * * * Dr. Cox has been called by the Court as a witness and has been placed under oath.

[RECORD—P. 747] THE COURT: * * * Gentlemen, as I've indicated, the only other person whose testimony I'd like to hear is that of Dr. Jimenez who is not here today, as I told you the reason why. And pursuant to the bench conference we have decided on October 21st at 10:00.

EXCERPTS FROM SANITY HEARING HELD OCTOBER 21, 1988

[RECORD—P. 761] [EXAMINATION OF DR. JIMENEZ] Q I have just two questions, in response: The mood, affect, speech and coherence that you found fairly appropriate on these two visits are solely the result of the Haldol-D, is that true?

A That's right, sir.

Q And in summary—and I don't want to put words in your mouth—but, in summary, isn't it correct to say that if Michael is given large amounts of Haldol-D, he can be, he can, on occasion, be appropriate? And, now, on—if he is not given Haldol-D, he is going to be crazy?

A That's accurate, in the sense that the dosage of the medication is being readjusted based on the mental status and behavior of the patient.

[RECORD—P. 763] BY THE COURT: Gentlemen, I have reviewed your various briefs that you've submitted throughout these proceedings, and I have reviewed 'em, I've done my own independent research and I am prepared to rule. Is there any further argument not included in your brief or memoranda that you want to state at this time, Mr. Nordyke?

MR. NORDYKE: Your Honor, I don't believe so. I think everything that we have stated is either objected to in written form or else argued.

What about you, Mr. Giarrusso?

MR. GIARRUSSO: Likewise, Your Honor.

And, Ms. Denlinger?

MS. DENLINGER: Yes, Sir.

[RECORD—P. 766] BY MR. NORDYKE: The only thing I would point out in rebuttal, Your Honor, is the doctor's testimony is clear, that all things were said to the doctor on the two occasions in September were the result of the Haldol-D; that squares the issue.

[RECORD—P. 794] [BY THE COURT]: So I am going to set an appeal return date, or a writ perfection date, thirty days from today. That date will be November the 22nd. Assignments of error to be filed by November 16th. Transcript to be filed by November 10th.

And the Court will stay the execution of the judgment entered today.

* * *

APPENDIX B
LOUISIANA CODE OF CRIMINAL PROCEDURE,
TITLE XXI, CHAPTER 1 "MENTAL INCAPACITY
TO PROCEED"

Art. 641. Mental incapacity to proceed defined

Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense.

Official Revision Comment

(a) The test of mental incapacity conforms with the prior law and is a test that has been almost universally adopted. It is a combination of the formula stated in Art. 267 of the 1928 Louisiana Code of Criminal Procedure and the clearly stated application of that principle in Sec. 4.04 of the A.L.I. Model Penal Code. The A.L.I. Comment states:

"More commonly however, the statute merely refers to 'insanity' or 'unsound mind' but, when that is so, the term has almost always been interpreted judicially to refer to a defendant's incapacity to understand the proceedings or to participate in his defense." The Comment further points out that in England also, "... the inquiry appears to be genuinely focused on the defendant's capacity to understand and to defend. See Royal Commission on Capital Punishment, Report (1953) par. 223."

(b) The effect of amnesia which renders the defendant unable to remember the crime or to account for his conduct or whereabouts on that occasion, is generally stated in *State v. Swails*, 223 La. 751, 66 So.2d 796 (1953). In *Swails*, where the defendant had pleaded insanity at the time of the crime as a defense, the Louisiana Supreme Court rejected the claim of amnesia as lack of capacity to stand trial; and Justice McCaleb briefly stated (66 So.2d at 800):

"This contention would be very forceful and persuasive were this a prosecution in which the accused was pleading not guilty for, in such case, his inability to inform his counsel of any

of the facts regarding his own movements in relation to the charges against him would materially affect him in his defense. But, here, appellant is pleading insanity at the time of the commission of the crimes—a special defense under our law. LSA-R.S. 14:14 and 15:261. His alleged amnesia as to the events occurring at, before and after the crimes were committed is not a factor which hampers his defense. On the contrary, the very fact that appellant does not remember anything concerning his alleged criminal acts may be of material aid to his counsel in their presentation of a case of insanity and his testimony, if he sees fit to take the stand, may have considerable weight with the jury.”

Alcoholic amnesia, consisting of the defendant's failure to recollect his behavior while under the influence of excessive alcoholic beverages is never a bar to trial, since it is not “a result of a mental disease or defect.” *State v. Palmer*, 232 La. 468, 94 So.2d 439 (1957).

Art. 642. How mental incapacity is raised; effect

The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, or the court. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

Official Revision Comment

(a) Although present incapacity to stand trial is ordinarily urged by the defense, it may be raised by the district attorney or on the court's own motion. It is in the interest of fair administration of justice that a defendant who lacks the capacity to understand the proceedings against him and to assist in his defense should not be brought to trial while that condition exists. Art. 267 of the 1928 Code of Criminal Procedure, as amended in 1932, similarly provided for appointment of a lunacy commission whenever “the court has reasonable ground to believe that the defendant . . . is insane or mentally defective to the extent that (he) is unable to understand the proceedings against him or to assist in his defense.” This provision was applied in *State v. Hebert*, 186 La. 308, 172 So. 167 (1937), to uphold the trial judge's appoint-

ment of a lunacy commission on the district attorney's suggestion that the defendant might be mentally unfit to proceed with the trial, and despite the fact that no plea of present insanity had been tendered by the defense.

(b) When the question of the defendant's mental capacity to proceed has been raised, all proceedings in the case are stayed until that issue is determined, thus making sure that no action prejudicial to the defendant will be taken until the defendant's capacity to understand the nature of the proceedings and to assist in his defense has been established. An exception is made as to *institution* of the criminal prosecution. This may sometimes be necessary in order to prevent the time limitations on the institution of the prosecution from running out while the proceedings against a mentally incapable defendant have been stayed. Only the time limitations *upon commencement of trial* are interrupted by insanity of the defendant. See Art. 579.

Art. 643. Order for mental examination

The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed. Prior to the ordering of any such mental examination, the court shall appoint counsel to represent the defendant if he has not already retained counsel. *Amended by Acts 1975, No. 325, § 1.*

Official Revision Comment

(a) The ordering of a mental examination as to the defendant's present capacity to proceed rests in the sound discretion of the court. It is not enough that the defense has filed a motion urging the defense, but there must be sufficient evidence to raise a reasonable doubt as to such capacity. Art. 267 of the 1928 Code providing for the defense of present unfitness, has been similarly construed in *State v. Ridgway*, 178 La. 609, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v. Messer*, 194 La. 238, 193 So. 633 (1940); *State v. Washington*, 207 La. 849, 22 So.2d 193 (1945); *State v. Ledet*, 211 La. 769, 30 So.2d 830 (1947); *State v. Green*, 221 La. 713, 60 So.2d 208 (1952). If there is a substantial doubt as to the defendant's mental capacity it is an abuse of discretion for the trial judge to refuse to order a mental examination. See *State v. Allen*, 204 La. 513, 15 So.2d 870 (1943).

(b) The mental examination ordinarily will be limited to a determination of present mental capacity to proceed. It will not include a determination of the defendant's mental condition at the time of the crime, unless the defense of insanity at the time of the crime is urged and "becomes an issue in the cause." *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Criminal Law and Procedure*, 17 La.L.Rev. 404, 411 (1957).

(c) A defendant whose mental capacity to proceed is in doubt may not be qualified to determine his need for legal assistance nor capable of procuring counsel; therefore, this article makes special provision for counsel, because the usual provisions for appointment of counsel at arraignment do not afford full protection of such a defendant's interests. As under former R.S. 15:271, enacted in 1964, this right to counsel is not limited to felony cases.

Art. 644. Appointment of sanity commission; examination of defendant

A. Within seven days after a mental examination is ordered, the court shall appoint a sanity commission to examine and report upon the mental condition of the defendant. The sanity commission shall consist of at least two and not more than three physicians who are licensed to practice medicine in Louisiana and have been in the actual practice of medicine for not less than three consecutive years immediately preceding the appointment. No more than one member of the commission shall be the coroner or any one of his deputies. The court may appoint, in lieu of one physician, a psychologist who is licensed to practice psychology in Louisiana and who has been engaged in the practice of clinical or counseling psychology for not less than three consecutive years immediately preceding the appointment.

B. The physicians appointed to make the examination shall have free access to the defendant at all reasonable times. The court shall subpoena witnesses to attend the examination at the request of the defendant, the commission, or any member thereof.

C. For the purpose of the mental examination, the court may order a defendant previously released on bail to appear for mental examinations and hearings in the same manner as other proceedings.

Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 577, § 1.

Official Revision Comment

(a) Other than the minimal requirements that the members of the sanity commission must be regularly licensed physicians with three years' actual practice, the determination of the qualifications of the members is left in the sound discretion of the trial judge. It is contemplated that Louisiana courts will continue their practice of appointing a psychiatrist or psychiatrists when available, as under a similar discretionary provision of amended Art. 269 of the 1928 Code of Criminal Procedure. Similarly, the coroner will frequently be well qualified to serve as a member of the commission and may be appointed. It is logical to assume that the court will appoint the most competent physicians available—for the value and weight of the sanity commission's report will largely depend on the competency and prestige of its members.

(b) The type of examination and procedures to be followed will be determined by the sanity commission, subject to such general directions as the court may include in the order for examination. The Louisiana Supreme Court has recently affirmed the wisdom of flexible sanity commission procedures, stating: "There is nothing in the statute requiring that an accused be kept under constant observation for any fixed period of time, and the legislature has not therein attempted to dictate to these experts in the manner and method to be employed by them in conducting their examination, undoubtedly feeling, as do we, that they are eminently better qualified to know just exactly how to best carry out their duties in this respect as the particular facts of each case may warrant." *State v. Faciane*, 233 La. 1028, 1048, 99 So.2d 333, 340 (1957); *State v. Augustine*, 241 La. 761, 131 So.2d 56 (1961).

(c) Confinement of the defendant in custody for the purpose of the examination, the right of free access to the defendant at all reasonable times, and the power to procure compulsory attendance of witnesses are all necessary to enable the commission to make accurate and complete investigations.

Art. 645. Report of sanity commission

The report of the sanity commission shall be filed in triplicate with the presiding judge within thirty days after the date of the order of appointment. The time for filing may be extended by the court. The clerk shall make copies of the report available to the district attorney and to the defendant or his counsel without cost.

Official Revision Comment

(a) The A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.05(1), authorizes commitment for a period not exceeding sixty days or such longer period as the court determines to be necessary. Art. 269 of the 1928 Louisiana Code provided that the sanity commission should report within thirty days. This article is a compromise. It makes the normal period thirty days after the date of the order of appointment, but allows the court to extend the time for filing the commission's report when additional time is required for the examination.

(b) The requirement that the report be filed in triplicate and copies made available to the district attorney and the defendant, makes the report fully available to all interested parties. Art. 269 of the 1928 Louisiana Code of Criminal Procedure similarly required that the report be made in writing and be accessible to the district attorney and the attorney of the accused. The importance of accessibility of a written copy of the report is shown by *State v. Winfield*, 222 La. 157, 62 So.2d 258 (1952), discussed in *The Work of the Supreme Court for the 1952-1953 Term—Criminal Procedure*, 14 La.L.Rev. 231, 235 (1953). In *Winfield* the trial judge was held to have committed reversible error in determining the issue of present insanity on the basis of a telephone report of the findings of the lunacy commission, rather than waiting for the actual filing of a written report. The underlying basis of the *Winfield* decision clearly appeared in Justice Moise's statement that "The mandatory provisions of the statute—that *the written report of the commission shall be presented to the trial judge and shall be accessible to the district attorney and to the attorney for the accused*—were not followed." (Emphasis by the court.) *Id.* at 161, 62 So.2d at 259.

Art. 646. Examination by physician retained by defense or district attorney

The court order for a mental examination shall not deprive the defendant or the district attorney of the right to an independent mental examination by a physician of his choice, and such physician shall be permitted to have reasonable access to the defendant for the purposes of the examination.

Official Revision Comment

This article, following Art. 268 of the 1928 Louisiana Code, continues the right of the defense or of the district attorney, to have the defendant examined by physicians of their own choice. The Comment to a somewhat similar provision of the A.L.I. Model Penal Code, Proposed Official Draft (1962), § 4.07(2), states that it "clears up a disputed point in a small numbers of jurisdictions where the defendant may have to have the consent of the warden or some other official before a psychiatrist of his own choosing may examine a defendant who is in custody."

Art. 647. Determination of mental capacity to proceed

The issue of the defendant's mental capacity to proceed shall be determined by the court in a contradictory hearing. The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Regardless of who calls them as witnesses, the members of the commission are subject to cross-examination by the defense, by the district attorney, and by the court. Other evidence pertaining to the defendant's mental capacity to proceed may be introduced at the hearing by the defense and by the district attorney.

Official Revision Comment

(a) This article adopts the rule of Art. 267 of the 1928 Louisiana Code, and of Sec. 4.06(1) of the A.L.I. Model Penal Code, Proposed Official Draft (1962), that the issue of the defendant's fitness to proceed shall be determined by the court. The A.L.I. Comment to Sec. 4.06(1) lists 11 states and the federal laws (18 U.S.C. § 4244), that exclude a jury trial on the issue of fitness to proceed. Accord: *State v. Ridgway*, 178 La. 606, 152 So. 306 (1934); *State v. Neu*, 180 La. 545, 157 So. 105 (1934); *State v.*

Hebert, 186 La. 308, 172 So. 167 (1937); *State v. Bessar*, 213 La. 299, 34 So.2d 785 (1948); *State v. Cook*, 215 La. 163, 39 So.2d 898 (1949).

(b) The requirement of a contradictory hearing follows the rule of Art. 267 of the 1928 Code of Criminal Procedure. *State v. Hebert*, 186 La. 308, 172 So.2d 167 (1937).

(c) The express provision that the report of the sanity commission is admissible in evidence at the hearing conforms with the A.L.I. Model Penal Code, § 4.06(1) (Tent. Draft No. 4, 1955). The Comment to that provision states that it "may be interpreted as creating or at least allowing for an exception to the hearsay rule in connection with receiving in evidence the report of the examining experts without requiring that they appear and testify, thus obviating the necessity for taking the testimony of these experts in every case in which a report is contested [citing *Wis. Stats.*]." Nevertheless, full provision is made for utilization of direct testimony of the commission members in explanation and support of their findings.

(d) The last sentence, authorizing the introduction of other evidence, follows through on the right of the defense and the district attorney to have the defendant examined by their own psychiatrist or other physician. The provisions for testimony at the hearing further point up the general proposition that the report is only prima facie evidence of the sanity commission's findings and conclusions. In *State v. Hebert*, 187 La. 318, 174 So. 369 (1937), the supreme Court considered the testimony of the court-appointed physicians and of other witnesses in concluding that the trial judge had erred in adopting the lunacy commission's report of present insanity. The commissioners' report, according to the supreme court, was not supported by their testimony or by the testimony of all witnesses as a whole.

Art. 648. Procedure after determination of mental capacity or incapacity

A. The criminal prosecution shall be resumed if the court determines that the defendant has the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and the court shall commit the

defendant to the custody of the Department of Health and Human Resources or a private institution approved by the court for custody, care, and treatment as long as the lack of capacity continues. If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R.S. 28:2(28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution as defined by R.S. 28:2(28). Defendants committed to the custody of the Department of Health and Human Resources shall be given inpatient care and treatment at an institution as defined by R.S. 28:2(28); however, a person charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence shall be maintained in custody at the forensic unit at Feliciana Forensic Facility.

B. (1) In no instance shall such custody, care, and treatment exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing

trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from state correctional institutions. *Amended by Acts 1975, No. 325 § 1; Acts 1979, No. 318, § 1; Acts 1980, No. 612, § 1; Acts 1982, No. 495, § 1; Acts 1983, No. 399, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) Committing a mentally incapacitated defendant to a state mental institution for as long as such incapacity continues is in conformity with the usual disposition of such cases. See Art. 267 of the 1928 Louisiana Code of Criminal Procedure.

(b) Appellate review of the court's determination of mental capacity to proceed or of the necessity of ordering a mental examination, will follow the normal procedures. If the court improperly refuses to order a mental examination and appoint a sanity commission, the defendant's remedy is to reserve a bill of exceptions and urge this objection as a ground for a motion for a new trial which will be the basis of an ultimate appeal. *State v. Leon*, 177 La. 293, 148 So. 54 (1933). Likewise, the defendant can reserve a bill of exceptions to the court's determination of present mental capacity and have that question reviewed on appeal. *State v. Neu*, 180 La. 545, 157 So. 105 (1934).

The defendant has a right of direct appeal from a determination of present lack of capacity to stand trial when he would prefer an immediate trial rather than commitment to a mental institution. "(A)n appeal lies from such judgment [of present incapacity] because it is final in so far as the only issue involved

in such a proceedings is concerned and is prejudicial because it deprives the party of his liberty." *State v. Hebert*, 187 La. 318, 324, 174 So. 369, 371 (1937); *State v. Gunter*, 208 La. 694, 23 So.2d 305 (1945). *State v. Yaun*, 237 La. 186, 110 So.2d 573 (1956), classified this type of ruling as an appealable final judgment.

The state's appellate remedy, as in the case of other adverse preliminary rulings, is necessarily by immediate appeal for it has no review after an acquittal. Although there are no supreme court decisions in point, a ruling that the defendant is presently incapable of standing trial is final determination of that issue, and the state's case might be seriously prejudiced by the resulting delay in bringing the defendant to trial. Such a determination does not relate to the basic issue of guilt or innocence; therefore the facts may be reviewed on appeal. *Op. Atty. Gen.*, 1942-44, p. 249; *State v. Hebert*, 187 La. 318, 174 So. 369 (1937).

(c) Great hardship may result in some cases, for example, the case of a defendant charged with a nonviolent offense who is committed for a long period pending a finding of present capacity to proceed. In such a situation probation is authorized upon a finding that the defendant is not being helped by continued custody in the mental institution and that he may be released without danger. The public is further protected by the requirement that the probation may be granted only on recommendation of the superintendent of the mental institution and by an order of the committing court. Probation procedures follow the applicable provisions of Art. 657. Conditions of the probation, to be imposed by the court, may include submission to treatment, abstinence from alcohol, special help by parents, or other appropriate requirements designed to aid in recovery and to fully protect the public.

Art. 648.1. Information required prior to admission

No superintendent of an institution shall admit a defendant found by the court to lack the mental capacity to proceed pursuant to Art. 648 unless he is furnished by the court the following information:

- (1) The name and address of the defendant's attorney.
- (2) The crime or crimes with which the defendant is charged and the date of such charge or charges.

(3) A copy of the report of the sanity commission.

(4) Any other pertinent information concerning the defendant's health which has come to the attention of the court such as injuries sustained at the time of arrest or injuries sustained following incarceration. *Added by Acts 1975, No. 325, § 2.*

Art. 649. Procedure when capacity regained

A. At any time after a defendant's commitment, if the superintendent of the mental institution reports to the committing court that the defendant presently has the mental capacity to proceed, the court shall hold a contradictory hearing within thirty days on that issue.

B. Prior to such a hearing, the court shall appoint counsel to represent the defendant if the defendant does not have counsel, and shall order a mental examination by a sanity commission appointed in conformity with Article 644. If the committing court does not hold a hearing within thirty days, the sheriff of the parish from which the defendant was committed shall appear at the institution within seven days thereafter and shall receive and hold the defendant in custody pending further orders of the committing court. If the sheriff fails to appear with a court order and accept custody of the defendant, the superintendent of the state mental institution or the director of the mental health unit shall notify the judicial administrator and the attorney general of such fact. Thereafter the Criminal Court Fund of the parish from which the defendant was committed shall pay to the general fund of the state the sum of one hundred dollars a day until the sheriff appears and accepts custody of the defendant for the court.

C. The district attorney or the defense may apply to the court to have the proceedings resumed, on the ground that the defendant presently has the mental capacity to proceed. Upon receipt of such application the court shall hold a contradictory hearing to determine if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed. The court may direct the superintendent of the mental institution where the defendant is committed to make a report and recommendation prior to such hearing as to whether the defendant presently has capacity to proceed, or may order an independent mental examination by a sanity commission appointed in conformity with Article 644.

D. Reports as to present mental capacity to proceed shall be filed

in conformity with Article 645, and the court's determination of present mental capacity to proceed shall be made in conformity with the appropriate provisions of Articles 646 and 647.

E. If the court determines that the defendant has the mental capacity to proceed, the proceedings shall be promptly resumed. *Amended by Acts 1975, No. 325, § 1; Acts 1987, No. 928, § 1, eff. July 20, 1987; Acts 1988, No. 383, § 1.*

Official Revision Comment

(a) This article provides a procedure for a redetermination of the present capacity issues when it later appears that the defendant may be capable of proceeding with the trial. The subsequent hearing as to capacity may be instigated by a report by the superintendent of the mental institution to which the defendant was committed, or by an application made by the district attorney or the defense. Certain differences inherent in the two procedures necessitated the partially separate statement.

(b) Under the first paragraph, when the superintendent of the mental institution reports that the defendant presently has capacity to proceed, a contradictory hearing is mandatory. The hearing must be held within thirty days and the defendant must be represented by counsel at the hearing. The requirement of a prompt hearing is fortified by the second paragraph, which authorizes the superintendent of the mental institution to return the defendant to the parish from which he was committed if the hearing is not held within the prescribed thirty days.

(c) Under the third paragraph, when the district attorney or the defense applies to have the proceedings resumed, the court is required to hold a contradictory hearing only if there is reasonable ground to believe that the defendant presently has the mental capacity to proceed, *i.e.*, if there is a *prima facie* showing of present capacity.

(d) In both situations the ordering of an independent mental examination is discretionary with the court. When the superintendent of the mental institution reports that the defendant is capable of standing trial, the court may not feel that a further examination is necessary. When application is made by the district attorney or the defense, it is quite likely that the order for a men-

tal examination will be directed to the superintendent of the mental hospital where the defendant is committed. Such an examination and report will be a part of the services of that state institution, but the staff psychiatrist making the examination will be entitled to reasonable fees as an expert witness, and traveling expenses when he testifies at the hearing. Art. 660. Appointment of an independent sanity commission, in conformity with Art. 644 is also expressly authorized.

(e) Additional examinations by the defense and district attorney will be authorized under Art. 646. The court's determination of the question of regained capacity to stand trial is in accord with *State v. Laborde*, 210 La. 291, 26 So.2d 749 (1946), which held that the court was not limited to or bound by recommendations of the physicians.

Art. 649.1. Prescribed medication; administration

When a person is returned to the committing court from an institution pursuant to Article 649 pending a sanity hearing, and the superintendent of the committing institution deems it necessary that the patient receive prescribed medication, it shall be the duty of the chief administrative officer of the parish jail to make such medication available to the person until such time as the coroner or another physician finds that the medication or its prescribed dosage is no longer necessary. *Added by Acts 1975, No. 325, § 2.*

APPENDIX C

LOUISIANA REVISED STATUTES, TITLE 28, SECTIONS 2 AND 171

§ 2. Definitions

Whenever used in this Title, the masculine shall include the feminine, the singular shall include the plural, and the following definitions shall apply:

(1) "Conditional discharge" means the physical release of a judicially committed person from a treatment facility by the director or by the court. The patient may be required to report for out patient treatment as a condition of his release. The judicial commitment of such persons shall remain in effect for a period of up to one year and during this time the person may be hospitalized involuntarily for appropriate medical reasons upon court order.

(2) "Court" means any duly constituted district court or court having family or juvenile jurisdiction. "Court" does not include a city court, which shall have no jurisdiction to commit persons to mental health treatment facilities in civil or criminal proceedings, except when exercising juvenile jurisdiction.

(3) "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

(4) "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

(5) "Diagnosis" means the art and science of determining the presence of disease in an individual and distinguishing one disease from another.

(6) "Director" or "superintendent" means a person in charge of a treatment facility or his deputy.

(7) "Discharge" means the full or conditional release from a treatment facility of any person admitted or otherwise detained under this Chapter.

(8) "Department" means the Department of Health and Human Resources.

(9) "Formal voluntary admission" means the admission of a person suffering from mental illness or substance abuse desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be formally admitted upon his written request. Such persons may be detained following a request for discharge pursuant to R.S. 28:52.2.

(10) "Gravely disabled" means the condition of a person who is unable to provide for his own basic physical needs, such as essential food, clothing, medical care, and shelter, as a result of serious mental illness or substance abuse and is unable to survive safely in freedom or protect himself from serious harm; the term also includes incapacitation by alcohol, which means the condition of a person who, as a result of the use of alcohol, is unconscious or whose judgment is otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

(11) "Informal voluntary admission" means the admission of a person suffering from mental illness or substance abuse, desiring admission to a treatment facility for diagnosis and/or treatment of such condition who may be admitted upon his request without making formal application.

(12) "Major surgical procedure" means an invasive procedure of a serious nature with incision upon the body or parts thereof under general, local or spinal anesthesia, utilizing surgical instruments, for the purpose of diagnosis or treatment of a medical condition. Diagnostic procedures, including, but not limited to, the following, shall not be considered as major surgical procedures:

(a) Endoscopy through natural body openings, such as the mouth, anus, or urethra, to view the trachea, bronchi, esophagus, stomach, pancreas, small or large intestine, urethra, urinary bladder, or ureters, and to obtain from such organs specimens of fluids or tissues for chemical or microscopic analysis.

(b) Sub-cutaneous percutaneous liver biopsy.

(c) Punch biopsy of skeletal muscles.

(d) Bone marrow biopsy.

(e) Lumbar puncture.

(f) Myelogram.

(g) Thoracocentesis.

(h) Abdominocentesis.

(i) Conization of the uterine cervix.

(j) Renal angiography.

(k) Femoral angiography.

(l) Carotid angiography.

(m) Vertebral angiography.

(13) "Mental health advocacy service" means a service established by the state of Louisiana for the purpose of providing legal counsel and representation for mentally disabled persons and to insure that their legal rights are protected.

(14) "Mentally ill person" means any person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

(15) "Minor" means a person under eighteen years of age.

(16) "Parent" means a person who is the biological mother or father of an individual or the legally adoptive mother or father of an individual.

(17) "Patient" means any person detained and taken care of as a mentally ill person or person suffering from substance abuse.

(18) "Peace officer" means any sheriff, police officer, or other person deputized by proper authority to serve as a peace officer.

(19) "Person of legal age" means any person eighteen years of age or older.

(20) "Petition" means a written civil complaint filed by a person of legal age alleging that a person is mentally ill or suffering from substance abuse and requires judicial commitment to a treatment facility.

(21) "Physician" means a person permitted to practice and in active practice as a physician under the laws of Louisiana or a person in a post-graduate medical training program of an accredited medical

school in Louisiana or a medical officer similarly qualified by the government of the United States while in the state in the performance of his official duties.

(22) "Psychiatrist" means a physician who has at least three years of formal training or primary experience in the diagnosis and treatment of mental illness.

(23) "Respondent" means a person alleged to be mentally ill or suffering from substance abuse and for whom an application for commitment to a treatment facility has been filed.

(24) "Restraint" means the partial or total immobilization of any or all of the extremities or the torso by mechanical means.

(25) "Substance abuse" means the condition of a person who uses narcotic, stimulant, depressant, soporific, tranquilizing, or hallucinogenic drugs or alcohol to the extent that it renders the person dangerous to himself or others or renders the person gravely disabled.

(26) "Transfer" means the removal of a patient from one mental institution to another without any procedure for admission other than is prescribed by the department.

(27) "Treatment" means an active effort to accomplish an improvement in the mental condition or behavior of a patient or to prevent deterioration in his condition or behavior. Treatment includes, but is not limited to, hospitalization, partial hospitalization, outpatient services, examination, diagnosis, training, the use of pharmaceuticals, and other services provided for patients by a treatment facility.

(28) (a) "Treatment facility" means any public or private hospital, retreat, institution, mental health center, or facility licensed by the state of Louisiana in which any mentally ill person or person suffering from substance abuse is received or detained as a patient. The term includes Veterans Administration and public health hospitals and forensic facilities. "Treatment facility" includes, but is not limited to, the following, and shall be selected with consideration of first, medical suitability; second, least restriction of the person's liberty; third, nearness to the patient's usual residence; and fourth, financial or other status of the patient, except that such considerations shall not apply to forensic facilities:

- (i) Community mental health centers.

- (ii) Private clinics.
- (iii) Public or private halfway houses.
- (iv) Public or private nursing homes.
- (v) Public or private general hospitals.
- (vi) Public or private mental hospitals.
- (vii) Detoxification centers.
- (viii) Substance abuse clinics.
- (ix) Substance abuse in-patient facility.
- (x) Forensic facilities.

(b) Patients involuntarily hospitalized by emergency certificate for mental health treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), (viii), or (x) of this Paragraph, except that patients in custody of the Department of Public Safety and Corrections may be admitted to forensic facilities by emergency certificate provided that judicial commitment proceedings are initiated during the period of treatment at the forensic facility authorized by emergency certificate. Patients involuntarily hospitalized by emergency certificate for substance abuse treatment shall not be admitted to the facilities listed in Subparagraphs (ii), (iii), (iv), or (x) of this Paragraph. Judicial commitments, however, may be made to any of the above facilities except forensic facilities. However, in the case of any involuntary hospitalization as a result of such emergency certificate for substance abuse or in the case of any judicial commitment as the result of substance abuse, such commitment or hospitalization may be made to any of the above facilities, except forensic facilities, provided that such facility has a substance abuse in-patient operation maintained separate and apart from any mental health in-patient operation at such facility.

(c) "Treatment facility" shall not include a jail or prison of any kind, or any facility under the control or supervision of the Department of Public Safety and Corrections unless the facility has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility pursuant to R.S. 15:830.1(B); however, a jail or prison shall not be construed as a forensic facility. Only adult inmates sentenced to the Department of Public Safety and Corrections may be admitted to a treat-

ment facility designated pursuant to R.S. 15:830.1(B).

§ 171. Enumerations of rights; restrictions

A. No patient in a treatment facility pursuant to this Chapter shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the state of Louisiana, or the Constitution of the United States solely because of his status as a patient in a treatment facility. These rights, benefits, and privileges include, but are not limited to, civil service status; the right to vote; the right to privacy; rights relating to the granting, renewal, forfeiture, or denial of a license or permit for which the patient is otherwise eligible; and the right to enter contractual relationships and to manage property.

B. No patient in a treatment facility shall be presumed incompetent, nor shall such person be held incompetent except as determined by a court of competent jurisdiction. This determination shall be separate from the judicial determination of whether the person is a proper subject for involuntary commitment.

C. The patient in a treatment facility shall be permitted unimpeded, private and uncensored communication with persons of his choice by mail, telephone, and visitation. These rights may be restricted by the director of the treatment facility if sufficient cause exists and is so documented in the patient's medical records. The patient's legal counsel, as well as his next of kin or responsible party must be notified in writing of any such restrictions and the reasons therefor. When the cause for any restriction ceases to exist, the patient's full rights shall be reinstated. A patient shall have the right to communicate in any manner in private with his attorney at all times.

The director of a treatment facility shall ensure that correspondence can be conveniently received and mailed, that telephones are reasonably accessible, and that space for visits is available. Writing materials, postage, and telephone usage funds shall be provided in reasonable amounts to recipients who are unable to procure such items.

Reasonable times and places for the use of telephones and for visits may be established in writing by the director of any treatment facility.

D. Restraint may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or oth-

ers. In no event shall restraint be utilized solely to punish or discipline a patient, nor is restraint to be used as a convenience for the staff of the treatment facility. A person placed in restraints shall have his status reviewed periodically.

E. Seclusion may be used only as a therapeutic measure or to prevent a patient from causing physical or mental harm to himself or others. In no event shall seclusion be utilized solely to punish or discipline a patient, nor is seclusion to be used as a convenience for the staff of the treatment facility. A person placed in seclusion shall have his status reviewed periodically.

F. No patient confined by emergency certificate, judicial commitment, or non contested status shall receive major surgical procedures or electroshock therapy without the written consent of a court of competent jurisdiction after a hearing.

If the director of the treatment facility, in consultation with two physicians, determines that the condition of such a patient is of such a critical nature that it may be life threatening unless major surgical procedures or electroshock therapy are administered, such emergency measures may be performed without the consent otherwise provided for in this Section. No physician shall be liable for a good faith determination that a medical emergency exists.

G. Every patient shall have the right to wear his own clothes; to keep and use his personal possessions, including toilet articles, unless determined by a physician that these are medically inappropriate and the reasons therefor are documented in his medical record. The patient shall also be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases, and to have access to individual storage spaces for his private use. If the patient is financially unable to provide these articles for himself, the treatment facility shall provide a reasonable supply of clothing and toiletries.

H. Every patient shall have the right to be employed at a useful occupation depending upon his condition and available facilities.

I. Every patient shall have the right to sell the products of his personal skill and labor at the discretion of the director of the treatment facility and to keep or spend the proceeds thereof or to send them to his family.

J. Every patient shall have the right to be discharged from a treat-

ment facility when his condition has changed or improved to the extent that confinement and treatment at the treatment facility are no longer required. The director of the treatment facility shall have the authority to discharge a patient admitted by judicial commitment without the approval of the court which committed him to the treatment facility. The court shall be advised of any such discharge. The director shall not be legally responsible to any person for the subsequent acts or behavior of a patient discharged by him in good faith.

K. Every patient shall have the right to engage a private attorney. If a patient is indigent, he shall be provided an attorney by the mental health advocacy service, if he so requests. The attorneys provided by the mental health advocacy service or appointed by a court shall be interested in and qualified by training and/or experience in the field of mental health statutes and jurisprudence.

L. Every patient shall have the right to request an informal court hearing to be held at the discretion of the court within five days of the receipt of the request by the court. If the court determines that a hearing is appropriate and if the patient is not represented by an attorney of his own or from the mental health advocacy service, the court shall appoint an attorney to represent the patient. The purpose of the hearing shall be to determine whether or not the patient should be discharged from the treatment facility or transferred to a less restrictive and medically suitable treatment facility.

M. No provision hereof shall abridge or diminish the right of any patient to avail himself of the right of habeas corpus at any time.

N. Every patient shall have the right to be visited and examined at his own expense by a physician designated by him or a member of his family or an interested party. The physician may consult and confer with the medical staff of the treatment facility and have the benefit of all information contained in the patient's medical record.

O. Prefrontal lobotomy shall be prohibited as a treatment solely for mental or emotional illness.

P. No medication may be administered to a patient except upon the order of a physician. The physician is responsible for all medications which he has ordered and which are administered to a patient. A record of medications administered to each patient shall be kept in his medical record. Medication shall not be used for nonmedical reasons

such as punishment or for convenience of the staff.

Q. A person admitted to a treatment facility has the right to an individualized treatment plan and periodic review to determine his progress. The appropriate staff of the facility shall review the person's progress at least at intervals of thirty, ninety, one hundred eighty days and every one hundred eighty days thereafter. The staff shall enter into the person's medical record his response to medical treatment, his current mental status, and specific reasons why continued treatment is necessary in the current setting or whether a treatment facility is available which is medically suitable and less restrictive of the patient's liberty.

R. A person admitted to a treatment facility has the right to have available such treatment as is medically appropriate to his condition. Should the treatment facility be unable to provide an active and appropriate medical treatment program, the patient shall be discharged.

APPENDIX D
LOUISIANA REVISED STATUTES, TITLE 15,
SECTION 830.1

§ 830.1. Refusal of treatment by mentally ill or mentally retarded inmates

A. Whenever a mentally ill or mentally retarded inmate refuses treatment and any staff physician, staff psychiatrist, or consulting psychiatrist of the institution certifies that the treatment is necessary to prevent harm or injury to the inmate or to others, such treatment will be permitted for a period not to exceed fifteen days. If treatment for a longer period is deemed necessary, a petition shall be filed in a court of competent jurisdiction setting forth the reasons for the treatment. Treatment shall continue while the hearing is pending. After a hearing at which the mentally ill or mentally retarded inmate is represented by counsel, the court shall determine whether the inmate is competent and, if not, he shall order that appropriate treatment be provided. If the inmate does not have counsel, the court shall appoint an attorney to represent him. Reasonable attorney fees shall be fixed by the judge and paid by the state.

B. Treatment shall be administered at a treatment facility as designated by law, or at a facility under the control or supervision of the Department of Public Safety and Corrections that has been designated by the Department of Health and Human Resources and the Department of Public Safety and Corrections as a treatment facility.

C. Commitments pursuant to this Section shall be in accord with all procedures required by law in the case of judicial commitment. Nothing herein shall be construed to preclude any person in the custody of the Department of Public Safety and Corrections from any commitment or admission as may be otherwise provided by law.

APPENDIX E
STATE WHICH EXPRESSLY AUTHORIZES
MEDICATION TO ACHIEVE
COMPETENCY FOR EXECUTION

MARYLAND, Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states:
"An inmate is not incompetent merely because his or her competence
is dependent upon continuing treatment, including the use of medica-
tion."

APPENDIX F
STATES WHICH AUTHORIZE TREATMENT OR STAY
OR SUSPEND EXECUTION
UNTIL COMPETENCY IS REGAINED.

ALABAMA, Ala. Code § 15-16-23 (1975) authorizes suspending the execution of a death row inmate until the incompetent inmate "is restored to sanity."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4023 (1978) authorizes a condemned inmate, upon being determined by a jury that he is insane, to be taken and confined in a state hospital "until his reason is restored." Ariz. Rev. Stat. Ann. § 13-4024 (1978) dissolves the suspension once the inmate "recovers his sanity."

ARKANSAS, Ark. Stat. Ann § 16-90-506 (1959) orders an incompetent death row inmate "confined in the state hospital until such time as he may recover his sanity."

CALIFORNIA, Cal. [Suspension of Execution] Code § 3703 (1971) and § 3704.5 (1988) order an incompetent death row inmate "taken to a medical facility of the Department of Corrections" and "there kept in safe confinement until his or her reason is restored," and § 3704 (1971) authorizes a new execution date once the defendant "has recovered his sanity."

COLORADO, Colo. Rev. Stat. § 16-8-110 (1986) provides that no person shall be "tried, sentenced or executed if he is incompetent to proceed at that stage of the proceedings against him"; Colo. Rev. Stat. § 16-8-111 (3) (1986) authorizes the inmate's execution for the same offense "after he has been found restored to competency"; Colo. Rev. Stat. § 16-8-112 (2) (1986) provides that the incompetent inmate shall be committed as provided in Colo. Rev. Stat. § 16-8-105 (4) (1986), which authorizes an incompetent defendant committed to a state facility for "care and psychiatric treatment"; Colo. Rev. Stat. § 16-8-114 (1986) provides for a restoration to competency hearing and authorizes the court to "enter any new order necessary to facilitate the defendant's restoration to mental competency"; Colo. Rev. Stat. § 16-8-114.5 excludes any evidence "resulting from a refusal by the defendant to accept treatment" from the court's consideration in reaching a determination as to "the substantial probability that the defendant will not be restored to competency within the foreseeable future."

CONNECTICUT, Conn. Gen. Stat. § 54-101 (1982) orders a stay of execution and the inmate "transferred to any state hospital for mental illness for confinement, support and treatment until he recovers his sanity" and once "such person has recovered his sanity...said penalty shall be inflicted."

FLORIDA, Fla. Stat. § 922.07 (3) and (4) (1985) provide the governor with the authority to order the insane convict committed to a Department of Corrections mental health facility and "kept there until the facility administrator determines that he has been restored to sanity." Fla. Rule Crim. Pro. 3.811 (1987) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it shall not be executed." Rule Crim. Pro. 3.812 (1987) authorizes a hearing de novo on the inmate's competency for execution and allows the court under Rule 3.812 (c) (3) (1987) to "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." Rule Crim. Pro. 3.212 (c) (2) (1989) allows the court to order treatment of an incarcerated prisoner once that inmate has been found incompetent to proceed at any "material stage of a criminal proceeding" under Rule Crim. Pro. 3.210 (1989). Rule 3.212 (3) (1989) allows the court to commit the defendant for treatment to "restore a defendant's competence to proceed" if the court finds "(i) [t]hat the defendant meets the criteria for commitment as set forth by statute; (ii) [t]hat there is a substantial probability that the mental illness or mental retardation causing the defendant's incompetence will respond to treatment and that the defendant will regain competency to proceed in the reasonably foreseeable future; (iii) [t]hat treatment appropriate for restoration of the defendant's competence to proceed is available; (iv) [t]hat no appropriate treatment alternative less restrictive than that involving commitment is available." Committee Note under Rule 3.211 (1989) explaining the 1988 amendment states that "appropriate treatment may include maintaining the defendant on psychotropic or other medication. See Rule 3.215." Rule 3.215 (1989) provides that "[a] defendant...shall not automatically be deemed incompetent to proceed simply because his satisfactory mental condition is dependent upon such [psychotropic] medication, nor shall he be prohibited from proceeding solely because he is being administered medication under medical supervision for a mental or emotional condition."

GEORGIA, Ga. Code Ann. § 17-10-60 (1988) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1988) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1988) provides that this article is the exclusive procedure for determining competency for execution. Ga. Code Ann. § 17-10-68 (e) (1988) provides that if mental incompetency for execution is proven, the "court shall enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper." Ga. Code Ann. § 17-10-71 (1988) provides that if the convict "regains his or her mental competency" then any previously entered stay of execution is vacated.

IDAHO, Idaho Crim. Court Rule 38 provides only generally that any sentence of death shall be stayed "pending any appeal or review." The Idaho State Legislature repealed Idaho Code § 19-2709 through § 19-2712 regulating competency for execution in 1970. Two years later the State Legislature passed a general competency to proceed statute that includes competency to be punished. Idaho Code § 18-210 (1972) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 66-335 (1981) regulates commitments of mentally ill convicts. Idaho Code § 19-2523 (1982) allows a court "to authorize treatment during the period of confinement...if, after the sentencing hearing, it concludes by clear and convincing evidence that: (a) [t]he defendant suffers from a severe and reliably diagnosable mental illness or defect resulting in the defendant's inability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law; (b) [w]ithout treatment, the immediate prognosis is for major distress resulting in serious mental or physical deterioration of the defendant; (c) [t]reatment is available for such illness or defect; (d) [t]he relative risks and benefits of treatment or nontreatment are such that a reasonable person would consent to treatment."

ILLINOIS, Ill. Rev. Stat. ch. 38, § 1005-2-3 (1985) provides that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence." Subsec-

tion (4) of that statute provides that "if the offender is found unfit to be executed, he shall be remanded to the custody of the Department of Corrections until he becomes fit to be executed."

KENTUCKY, Ky. Rev. Stat. § 431.240 (1980) provides that the execution of an insane prisoner shall be stayed "until the condemned is restored to sanity." The statute further authorizes the commissioner of corrections to "transfer the condemned person to the state forensic psychiatric facility operated by the corrections cabinet until such time as he is restored to sanity."

MARYLAND, Md. [Crimes and Punishments] Code Ann. art. 27, § 75A (1987) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. [o]f the fact of his or her impending execution; and 2. [h]e or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. However, the statute expressly defines "incompetence" as not including an inmate whose competency to be executed is achieved and maintained by medication. Md. Code Ann. art. 27, § 75A (a) (2) (ii) (1987) states: "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the use of medication."

MISSISSIPPI, Miss. Code Ann. § 99-19-57 (1984) provides that if a convict under a sentence of death becomes insane, "the following shall be the exclusive procedural and substantive procedure....If it is found that the convict is insane...the court shall suspend the execution....The convict shall then be committed to the forensic unit....The order of commitment shall require...a written report be furnished to the court...stating whether there is a substantial probability that the convict will become sane...within the foreseeable future and whether progress is being made toward that goal." The statute further provides that the standard of incompetency for execution should be if the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."

MISSOURI, Mo. Rev. Stat. § 552.060 (1989) provides that "[n]o person

condemned to death shall be executed if, as a result of mental disease or defect, he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." The statute further directs the warden to "order a stay of execution." The insane prisoner is subject to transfer to a mental hospital, and later if he is "certified by the director as free of a mental disease or defect...the governor shall fix a new date for execution...." Mo. Rev. Stat. § 552.050 (1983) authorizes the inmate transferred "to a state mental hospital for custody, care and treatment" for up to 96 hours, after which time the mental health coordinator or head of the facility may file for involuntary detention and treatment. The statute further provides for involuntary treatment for an additional one year.

MONTANA, Mont. Code Ann. § 46-19-202 (1983) provides that if after judgment of death a defendant "lacks [mental] fitness" the execution is suspended and the court "shall commit him to the...state hospital...for so long as the lack of fitness endures...." Once "the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution" unless the court determines that "so much time has elapsed since the commitment...that it would be unjust to proceed...."

NEBRASKA, Neb. Rev. Stat. § 29-2537 (1973) authorizes a court to suspend the execution of a convict who appears to be mentally incompetent "until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. § 176.415 (1987) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. § 176.455 (1977) suspends the execution of an insane inmate "until the convicted person becomes sane" and includes an order to the director of the department of prisons "to confine such person in a safe place of confinement until his reason is restored." The statute further provides that "[i]f the convicted person thereafter becomes sane...the judge...shall enter an order vacating the order staying the execution of the judgment."

NEW MEXICO, N.M. Stat. Ann. § 31-14-6 (1984) provides that once a defendant under judgment of death is found insane as provided in

N.M. Stat. Ann. § 31-14-4 (1953), the court must order that "he be taken to the state hospital for the insane, and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1953) provides that a new execution date will be rescheduled "[w]hen the defendant recovers his reason."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001 (a) (1973) provides that "[n]o person may be tried, convicted, sentenced or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as 'incapacity to proceed.'" N.C. Gen. Stat. § 15A-1002 (b) (2) (1989) provides that incapacity to proceed may be raised at any time and when the defendant's capacity is questioned, the court "may order the defendant to a State facility for the mentally ill for observation and treatment, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1004 (1985) and N.C. Gen. Stat. § 15A-1006 (1973) require the court to return the defendant to trial "in the event that he subsequently becomes capable of proceeding." If incapacity continues in a felony case for 10 years, the court has authority under N.C. Gen. Stat. § 15A-1008 (1973) to dismiss the charges.

OHIO, Ohio Rev. Code Ann. § 2949.28 (1969) provides that "[e]xecution of the sentence [of an insane convict sentenced to death] shall be suspended pending completion of the inquiry." The comments to this statute cite the standard as "whether he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court." Ohio Rev. Code Ann. § 2949.29 (1969) provides that "[i]f it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution." Ohio Rev. Code Ann. § 2949.30 (1963) states that "if he is subsequently restored" the warden or sheriff shall report such finding to the governor, "who, when convinced that the convict is of sound mind, shall issue a warrant appointing a time for his execution."

OKLAHOMA, Okla. Stat. tit. 22, § 1005 (1981) requires that once "there is good reason to believe" that a convicted death row inmate has become insane, a jury must be impaneled to consider the inmate's competency. If the jury returns a verdict of insanity, Okla. Stat. tit. 22, § 1007 (1981) requires the court to order the defendant "taken to one of the state hospitals for the insane and there kept for safe confinement until his reason is restored." Okla. Stat. tit. 22, § 1008 (1981) requires the governor to reissue a warrant for the inmate's execution once "the defendant recovers his reason."

SOUTH DAKOTA, S.D. Comp. Laws Ann. § 23A-27A-22 (1979) provides that when a prisoner under sentence of death appears to be mentally incompetent to proceed, the governor is required to establish a sanity commission. S.D. Comp. Laws Ann. § 23A-27A-24 (1979) provides that once the commission finds the defendant mentally incompetent to proceed, the governor "shall suspend execution...and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill." S.D. Comp. Laws Ann. § 23A-27A-25 (1979) provides that once "the defendant is no longer mentally incompetent to proceed...the defendant shall be forthwith returned and delivered to the custody of the warden..., there to be dealt with according to law." S.D. Comp. Ann. § 23A-27A-26 (1979) mandates that the governor must then issue a new warrant commanding the recovered inmate's execution unless the sentence has been commuted or pardoned.

UTAH, Utah Code Ann. § 77-19-8 (1988) provides that the judgment of death may be suspended in cases of suspected incompetency for execution. Utah Code Ann. § 77-19-13 (1988) provides that the condemned inmate shall be examined under the provisions of Chapter 15, Title 77. If it is found that the defendant is incompetent, "the court shall immediately...enter an order for commitment under chapter 15, Title 77." Utah Code Ann. § 77-15-1 (1980) provides that "[n]o person who is incompetent to proceed shall be tried or punished for a public offense." According to Utah Code Ann. § 77-15-3 (1980), the chapter applies to any person charged with a public offense or serving a sentence of imprisonment. Utah Code Ann. § 77-15-5 (1980) allows the court to commit the individual "to the Utah state hospital, or to another facility for an evaluation not to exceed a period of 30 days based on examination, observation or treatment..." Upon a finding of incompe-

tence, the "court shall order him committed to the Utah state hospital...until the court which has committed him...finds that he is competent to proceed."

WYOMING, Wyo. Stat. § 7-13-901 (1987) provides that a convict under sentence of death lacks the "requisite mental capacity" if he lacks "the ability to understand the nature of death penalty and the reasons it was imposed." Wyo. Stat. § 7-13-902 (1987) provides that the court "shall stay the execution" of an incompetent death row inmate and order an examination. Subsection (f) of the statute provides that if the convict is found incompetent, the "judge shall suspend the execution...until a time when it is found that the convict has the requisite mental capacity."

APPENDIX G
FORMER DEATH PENALTY STATES
WHICH STAYED OR SUSPENDED EXECUTION
UNTIL COMPETENCY WAS REGAINED

KANSAS, Kan. Stat. Ann. § 22-4006 (1978) provided that the execution of an insane inmate shall be suspended "until further order" and "such proceedings may be had at such times as the district judge shall order until it is either determined that such convict is sane or incurably insane."

MASSACHUSETTS, Mass. Gen. Laws Ann. ch. 279, § 47 (repealed, 1957) provided that once a convict under sentence of death became insane, he was granted "a respite from execution" and the governor was authorized to order his removal "to the hospital...for care and treatment." The respite continued "until it is determined as herein provided that the convict is no longer insane." Mass. Gen. Laws Ann. ch. 279, § 62 (1983), provided the governor with the authority to "respite the execution" of an insane inmate "until it appears...that the prisoner is no longer insane. Upon such respite, the governor may order the removal of such prisoner to the hospital...." The governor could "further respite the execution of the sentence from time to time for a stated period, until it is determined that the prisoner is no longer insane, as herein provided." This capital punishment legislation was held unconstitutional under Article 12, Declaration of Rights of the Massachusetts State Constitution.

NEW YORK, N.Y. [Correct.] Law art. 22-B § 655 (repealed 1970) provided that an inmate under a sentence of death, once found to be insane, could be ordered removed "to a state hospital for insane convicts, there to remain until restored to his right mind, and it shall be the duty of the director of such hospital, whenever, in his opinion, said convict is cured of his insanity, to report the fact to a justice of the supreme court...which justice shall...cause him, the said convict, to be returned to the custody [sic] of the superintendent of the state institution whence he came, there to be dealt with according to law." N.Y. [Correct.] Law art. 22-B § 657 mandated that the governor, once the defendant was "cured of his insanity" or underwent a "restoration to sanity," to issue a warrant for the inmate's execution. New York's

death penalty statute mandating capital punishment for murders committed by inmates serving a life imprisonment sentence was held unconstitutional in 1984. See *People v. Smith*, 468 N.E. 2d 879 (N.Y. 1984).

APPENDIX H
DEATH PENALTY STATES
WHICH INVOLUNTARILY TREAT
CRIMINAL DEFENDANTS IN OTHER CONTEXTS

DELAWARE, Del. Code Ann. tit. 11, § 403 (1974) authorizes the court to commit a defendant found not guilty by reason of insanity to the Delaware State Hospital, subject to the court's approval, modification and periodic judicial evaluation of any specific treatment program. Del. Code Ann. tit. 11, § 404 (1974) authorizes the court to "order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial." Del. Code Ann. tit. 11, § 405 (1974) allows the court to order a prisoner who has become mentally ill after conviction but before sentencing "to be confined and treated in the Delaware State Hospital until he is capable of participating in the sentencing proceedings." Del. Code Ann. tit. 11, § 406 (1974) authorizes the Superior Court, after it appears that a prisoner has become mentally ill after conviction and sentence to order the prisoner transferred and confined in the Delaware State Hospital. Del. Code Ann. tit. 11, § 408 commits a defendant found guilty but mentally ill to the Department of Corrections where he "shall undergo further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated....[D]ecisions directly related to treatment for his mental illness shall be the joint responsibility of the Director of the Division of Alcoholism, Drug Abuse and Mental Health and those persons at the Delaware State Hospital who are directly responsible for such treatment." The statute further provides that "[t]he offender may, by written statement, refuse to take any drugs which are prescribed for treatment of his mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact." Del. Code Ann. tit. 11, § 409 authorizes the court to require psychological or psychiatric counseling and treatment as a condition of parole or probation, and failure to continue such treatment, except as the Department of Corrections may agree, is a grounds to revoke such release. The statute further provides that treatment is a condition of probation for any defendant found guilty but mentally ill.

INDIANA, Ind. Code § 35-36-2-5 (1983) provides that a defendant found guilty but mentally ill "shall be further evaluated and then treated in such a manner as is psychiatrically indicated for his mental illness. Treatment may be provided by: (1) the department of corrections; or (2) the department of mental health after transfer...." The statute provides further that "if a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may...require that he undergo treatment." Ind. Code § 35-36-3-1 (1986) authorizes the court, once it finds that the defendant lacks the ability to stand trial, to commit the defendant "to the department of mental health, to be confined by the department in the appropriate psychiatric institution." Ind. Code § 35-36-3-2 (1981) requires the superintendent of the department of mental health to certify the fact that the defendant has regained his capacity to stand trial, and the court shall "hold the trial as if no delay or postponement had occurred."

LOUISIANA, La. R.S. 28:53 (1989) and 28:55 (I) (1978), authorize involuntary treatment of inmates judicially committed; La.Cr.P. art. 648 (1988), art. 654 (1982), art. 657 (1987), La. R.S. 15:574.4 H (11) (1989), and La. R.S. 15:830.1 (1987), authorize involuntary treatment of pre-trial detainees, defendants found not guilty by reason of insanity, individuals released on probation or parole, and incarcerated prisoners respectively.

NEW HAMPSHIRE, N.H. Rev. Stat. Ann. § 651:11-a (1987) allows the court to conditionally release a criminal defendant subject to court-ordered treatment. Subd. IV (a) of that statute provides such condition may include "but [is] not limited to, a prescribed regimen of medical, psychiatric, or psychological care or treatment" with the court retaining authority to modify or eliminate conditions imposed. The statute further provides that the criminal defendant "as an explicit condition of release" must "comply with the conditions imposed by the court, including any prescribed regimen of...psychiatric...treatment" or else be subject to arrest.

NEW JERSEY, N.J. Rev. Stat. Ann. § 2C:4-4 (a) (1979) provides that "[n]o person who lacks the capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures." N. J. Rev. Stat. Ann. § 2C:4-6 (1979) further provides that an incompetent defendant may be either committed or released on an

outpatient basis until it is determined "whether it is substantially probable that the defendant could regain his competence within the foreseeable future." Once fitness is regained, proceedings against the defendant resume. The statute also provides for the conditional release or parole of a defendant. Persons acquitted by reason of insanity may be conditionally released, committed or transferred "to a less restrictive setting for treatment" as provided in N.J. Rev. Stat. Ann. § 2C:4-8 (1981) and 2C:4-9 (1979). New Jersey law also provides for the involuntary treatment of convicted sex offenders. N.J. Rev. Stat. Ann. § 2C:47-3 (a) (1979) states: "If the examination reveals that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, the court may, upon the recommendation of the Adult Diagnostic and Treatment Center, sentence the offender to the Center for a program of specialized treatment for his mental condition...." The statute further provides in subdivision (c) that in lieu of incarceration the court may place the offender on probation with the condition that "he receive outpatient psychological treatment in a manner to be prescribed in each individual case." Because a significant number of inmates in state-owned or operated correctional facilities are mentally ill, New Jersey enacted N.J. Rev. Stat. Ann. § 30:4-82.1 (1986) requiring treatment of those inmates "either in the form of counseling or inpatient treatment during the period of their incarceration." Treatment under N.J. Rev. Stat. Ann. § 30:4-82.2 (1986) includes "treatment with prescription drugs." The statute requires a mental health treatment plan for each inmate including procedures to terminate the treatment when no longer necessary and a biennial review and revision of the plan.

OREGON, Or. Rev. Stat. § 426.490 (1979) states the policy and intent of the Oregon Legislative Assembly in that "the State of Oregon shall assist in improving the quality of life of chronically mentally ill persons within this state...." Or. Rev. Stat. § 426.670 (1979) provides authority to the state's mental health division, either separately or in conjunction with the state corrections division, "to receive, treat, study and retain in custody, as required, such sexually dangerous persons as are committed...." A sexually dangerous person is defined in Or. Rev. Stat. § 426.510 (1977) as "a person who because of repeated or compulsive acts of misconduct in sexual matters, or because of a mental disease or defect, is deemed likely to continue to perform such acts and be a danger to other persons." Or. Rev. Stat. § 426.675 (1979) authorizes the

addressed in this brief.² ARGUMENT

Because of its membership and its long-standing involvement in other, related cases regarding the use of psychiatric testimony, the "right to refuse" forced psychotropic drugging and the interrelation of these issues with those of incarceration and the death penalty, the Coalition believes that it can contribute a valuable perspective as *amicus curiae* to this Court in the instant matter. Many of the clients and members of the Coalition's constituent organizations have had their own experiences dealing with psychiatric testimony and hospital reports as well as with the painful and disabling effects of any use of psychotropic drugs, including the involuntary use of these drugs in hospitals and prisons, in violation of their personal rights and autonomy. Finally, clients and members of the Coalition's organizations have undertaken extensive studies of the issues of the proper use of psychiatric and hospital reports and the uses and effects of the drugs involved in this case. See, e.g., *Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987).

Because of their concern that many patients and prisoners continue to be at risk because of the denial of their rights regarding psychiatric and hospital reports and their right to refuse psychotropic drugs, the members of the Coalition wish to share their experiences and views on these matters with this Court. This precedent-making case will undoubtedly affect the rights of other prisoners regarding these issues across the United States. *Amicus* believes that no other party or *amicus* will present the views of mental health consumers and their advocates to the Court in this case, and for the reasons set forth herein, respectfully submits this brief *amicus curiae*.

² See, e.g., the briefs *amicus curiae* filed by the Coalition in *United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Galioto*, U.S. , 106 S. Ct. 2683, 91 L. Ed. 2d 459 (1986) and *Colorado v. Connelly*, 497 U.S. 157, 107 S. Ct. 1551 (1986). See also the Brief of the Office of the Capital Collateral Representative, et. al. as *amicus curiae* in *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 355 (1986) and the proposed brief *amicus curiae* of the Coalition in *Satterwhite v. Texas*, U.S. , 108 S. Ct. 1792 (1988), on the issue of notice to counsel of a proposed interview by a psychiatrist. Most recently, the Coalition filed a brief *amicus curiae* in *Washington v. Harper*, U.S. , 110 S.Ct. 1028 (1990). See also the brief *amicus curiae* of the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy in *Harper*, 110 S. Ct. at p. 1052, n. 22.

II. SUMMARY OF ARGUMENT

By relying on the *ex parte* hospital reports, the trial court denied petitioner his Sixth Amendment rights to notice, confrontation and the assistance of counsel at the "critical stage" of the determination of his competency for execution. Under this Court's relevant caselaw -- particularly *Powell v. Alabama*, 297 U.S. 45 (1932), *United States v. Wade*, 388 U.S. 218 (1967) and *Satterwhite v. Texas*, U.S. , 108 S.Ct. 1792 (1988) -- petitioner was entitled to the assistance of his counsel before and during the process of preparing the hospital reports, as well as in challenging their substance through cross-examination. Pt. III A

Because of dangerous short term side effects of psychotropic drugs, petitioner had a right to refuse forced drugging solely for the purpose of preparing him for the death penalty. The state's interest in carrying out the sentence cannot justify forced drugging without a demonstrated necessity for legitimate treatment because of petitioner's danger to himself or others. *Washington v. Harper* U.S. , 110 S.Ct. 1028 (1990). Pt. III B.

Under *Ford v. Wainwright*, 472 U.S. 399 (1986) petitioner cannot be executed while his sanity constantly varies "like a moving target." The standard for competency to be executed must require that the condemned have more than merely a passing comprehension of the connection between his crime and his punishment and an awareness of his impending death. Pt. III C.

III. ARGUMENT

A. The Court's Reliance On The *Ex Parte* Records And Reports For Its Competency Determination Violated The Prisoner's Constitutional Rights To Notice, Confrontation And Assistance Of Counsel.

In seminal cases such as *Powell v. Alabama*, 287 U.S. 45 (1932) and *United States v. Wade*, 388 U.S. 218 (1967), this Court has recognized the right of the accused to the assistance of counsel in his defense. In *Powell*, this Court emphasized the particular need for adequate representation for persons with disabilities:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. 287 U.S. at 69.

In *Wade*, this Court underscored the special need for the assistance of counsel at certain strategic moments in criminal proceedings:

In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. ... The plain wording of this guarantee encompasses counsel's assistance *whenever necessary* to assure a meaningful defense... [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution, formal or informal, in court or out* where counsel's absence might derogate from the accused's right to a fair trial. *Wade*, 388 U.S. above at 224-226. (emphasis added)

Here, clearly, there could hardly be a more "critical" stage of Mr. Perry's proceedings than the hearing on his competency to be executed.³

³ See also, on the "critical stage" theory, *Cape v. Francis*, 741 F.2d 1287, 1304 (11th Cir. 1984) (Hatchett, J. dissenting)

The trial judge here unequivocally acknowledged his consideration of the hospital records and reports *inter alia* in determining Mr. Perry's competency to be executed. Appendix to the Petition of Writ for Certiorari ("Appendix"). That acknowledgement -- and the court's denial of the objection by the prisoner's counsel to any such consideration -- traduces the clear dictates of this Court's relevant decisions on due process and the right to counsel generally, and its decision in the context of psychiatric reports in particular.

For example, in *Specht v. Patterson*, 386 U.S. 603 (1967), involving a repetitive "sex offender" law, this Court held that due process required that the offender "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Specht*, 386 U.S. above at 610. Quoting from a Third Circuit decision on a comparable statute, the opinion noted:

Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. *Gerchman v. Maroney*, 355 F.2d 302, 312 (3rd Cir. 1966)

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977)⁴, the Court reviewed a capital sentencing procedure that allowed a judge to impose a death sentence on the basis of secret information not made available to defendants or their counsel. In overturning a death sentence based on that process, the Court dealt with the issue of the priority of such judicial confidences from counsel:

⁴ *Gardner* also contains a memorable quotation particularly applicable to the fact situation in this case involving the issue of the relative interests involved in balancing the patient's liberty interest in being free of unwanted drugging and the state's interest in using the drugging to achieve competency for purposes of execution: "[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Gardner*, 430 U.S. above at 357.

(T)he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases. *Gardner*, 430 U.S. above at 360.

In this case, the issue before the trial court was the competency of Mr. Perry *vel non* for purposes of execution rather than sentencing per se. However, the basic proposition established by those cases is nevertheless applicable here: that due process requires more than a one-sided presentation on the issues before the court, as occurred here regarding the hospital reports.

More recently in *Cronic v. United States*, U.S. , 104 S.Ct. 2034 (1984), this Court described the requirements of this evidentiary testing process as follows:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. ... But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *Cronic*, 104 S.Ct. above at 2045.

Here, the court's consideration of the hospital reports without any such testing in the "crucible" of cross-examination deprived this part of the competency hearing of its adversarial character and, thus, the accused of his Sixth Amendment rights. See also *Ford v. Wainwright*, 106 S.Ct. at 2605 (regarding the critical role of cross-examination in this context)

In specific context of psychiatric reports, the Court has repeatedly affirmed the necessity for notice, confrontation and the role of counsel. Most recently, in *Satterwhite v. Texas*, 108 S.Ct. 1792 (1988), this Court held that the failure to notify defendant's counsel before a psychiatric interview of his client and the improper introduction of that interview into evidence constituted reversible error. In its opinion the Court relied on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d

359 (1981) for the proposition that defendants charged with a capital offense have a Sixth Amendment right to have the assistance of counsel before submitting to psychiatric interviews to establish their future dangerousness. In *Satterwhite*, the failure to notify counsel necessarily resulted in the denial of this right of access to the assistance of counsel regarding the forthcoming psychiatric interview. The defendant's lawyer should have been able to prepare his client for the nature of the interview, possible questions and the background and role of the State psychiatrist.⁵ Here, the denial of the lawyer's ability to challenge the process by which the hospital records were created, as well as their substance, was, similarly, a denial of the assistance of the defendant's lawyer. See Pet. pp. 6-7, 30-31.⁶

⁵ For the purposes of the Sixth Amendment issues in this case, the court's review of Mr. Perry's competency -- similar to a capital sentencing proceeding -- must be viewed as closely analagous to his right to counsel and confrontation at the underlying trial itself. See, e.g., *Strickland v. Washington*, U.S. 104 S.Ct. 2052, at 2064 (1984):

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing procedure like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision ... that counsel's role in the proceedings is comparable to counsel's role at trial -- to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

⁶ *Strickland* also noted a variety of forms of denial of effective assistance of counsel through judicial or other interference:

Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant). *Strickland*, 104 S.Ct. above at 2063-64.

The common thread running through *Satterwhite*, *Estelle*, and other cases involving psychiatric witnesses such as *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), is that the defendant must be able to defend himself fairly against the State's psychiatric experts, their reports and testimony.⁷ These decisions all try to assure that, as much as possible, the defendant has access to a level playing field regarding these issues. Here, absent reasonable notice, an opportunity for confrontation and assistance of counsel regarding the hospital reports, defendant was denied his Fourteenth Amendment as well as his Sixth Amendment rights.

⁷ See, on the interrelationship of *Barefoot*, *Ake*, and *Strickland*, Perlin "Dulling the Ake in *Barefoot*'s Achilles Heel," 3 N.Y.L.S. Human Rts. Ann. 91 (1985). Clearly, under *Strickland*, counsel for the accused may have an obligation to challenge any hospital reports that have not been prepared or presented pursuant to notice to, assistance by or subject to the cross examination of defense counsel.

B. FORCED DRUGGING WITH DANGEROUS PSYCHOTROPICS IN ORDER TO PREPARE AN INSANE INMATE FOR THE DEATH PENALTY OFFENDS THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. The Known Dangerousness Of These Drugs Even In The Short Term.

The parties in this case -- and the trial court -- have extensively documented the well known long term side effects of Haldol, the drug involved in this case. See, e.g., Petition, pp. 22-23, Brief in Opposition to Petition for Certiorari ("Brief in Opp. Cert."), p. 5, Appendix, p. 43. Clearly, however, the unique factual situation of this case underscores the importance of the other end of the drugging continuum -- the equally well known, dangerous and painful effects of this and other similar drugs even in their short or near term usage. See, e.g., *Riese v. St. Mary's Hospital and Medical Center*, 196 Cal. App 3d 1886, 243 Cal. Rptr. 241 (1987) and *Goedecke v. State Dept. of Inst.*, 603 P. 2d 123 (Col. Sup. Ct. 1979). In this case, from *amicus'* perspective, this Court must focus on these increasingly well documented short term side effects -- quite apart from the very serious long term dangers of tardive dyskinesia and other side effects related to chronic use of these drugs.

The known short term side effects of the drug Haldol, the drug involved here, include the following:

Other CNS effects - Insomnia, restlessness, anxiety, euphoria, agitation, drowsiness, depression, lethargy, headache, confusion, vertigo, grand mal seizures, exacerbation of psychotic symptoms including hallucinations, and catatonic-like behavioral states which may be responsive to drug withdrawal and/or treatment with anticholinergic drugs. PHYSICIAN'S DESK REFERENCE, p. 1258 (44th Ed. 1990), (hereinafter "PDR").

Other: Cases of sudden and unexpected death have been reported in association with the administration of HALDOL. The nature of the evidence makes it impossible to determine definitively what role if any, HALDOL played in the outcome of the reported cases. The possibility that HALDOL caused death cannot, of course, be excluded,

but it is to be kept in mind that sudden and unexpected death may occur in psychotic patients when they go untreated or when they are treated with antipsychotic drugs.

PDR, p. 1286

With these warnings -- based on the 1989 manufacturer's own labeling of Haldol -- the PDR itself suggests the problem in Michael Perry's "treatment" with Haldol in the case.⁸ On a day to day, minute to minute basis the forced drugging of Mr. Perry is unpredictable, painful and dangerous -- even life-threatening. Thus, even without addressing the admitted possibility of tardive dyskinesia -- which the State of Louisiana so cynically dismissed (See Brief in Opp. Cert. p. 5: "Yet nothing in the record supports the fact that Perry now suffers from any side effects" (emphasis added)) -- the drug involved in this case has repeatedly been included in the list of drugs known for their serious *short term* side effects in numerous judicial opinions upholding the "right to refuse". See, e.g., *Riese v. St. Mary's Hospital and Medical Center*, 243 Cal. Rptr. 241, 209 CA 3d 1303 (1987) rev. grtd. 245 Cal. Rptr. 627, 751 p. 2d 893 (1988) rev. dismissed 259 Cal. Rptr. 669, 774 p. 2d 698 (1989).

Again, even the PDR summary includes repeated warnings regarding yet another of Haldol's more dangerous known side effects:

Neuroleptic Malignant Syndrome (NMS) - A potentially fatal ~~sympom~~ complex sometimes referred to as Neuroleptic Malignant Syndrome (NMS) has been reported in association with antipsychotic drugs. PDR, p. 1283.

⁸ The standard medical reference text on these and other drugs, Goodman and Gilman, *The Pharmacological Basis of Therapeutics* (5th Ed. 1975) includes this caveat regarding Haldol:

Side Effects and Toxicity. Haloperidol produces a high incidence of *extrapyramidal reactions*. These seem to be more prominent in younger patients. Haloperidol therapy should be initiated with caution. Reports of depression with the use of the drug may represent a true side effect or a reversion from a manic state. Severe hematological effects are rare, but leukopenia has been reported frequently; agranulocytosis has also occurred. *Op. cit.* p. 167. (emphasis added)

In a recent survey article about NMS, the author concluded as follows:

Despite treatment, some cases of neuroleptic malignant syndrome are fatal, most commonly from cardiopulmonary failure and myoglobinuria renal failure. Lazarus, *Neuroleptic Malignant Syndrome*, 40 *Hosp. and Comm. Psych.* 1229 (1989) ⁹ (hereinafter "Lazarus") (citing Shalev, Hermisch, Munitz, *Mortality from neuroleptic malignant syndrome*, 50 *Journal of Clinical Psychiatry* 18 (1989).

In summary, then, even a necessarily cursory review of the available general medical literature suggests that the use of Haldol and other similar drugs are indeed fraught with peril -- even in the short term. Thus, notwithstanding the State's denial and/or minimizing of Mr. Perry's suffering, ¹⁰ there are already indications of serious side effects here. See, e.g., Petition, pp

⁹ Of special relevance given the setting in this case -- a southern state prison death row -- are Dr. Lazarus' epidemiological observations regarding NMS: "Neuroleptic Malignant Syndrome has occurred worldwide ... (H)ot and humid weather, along with other factors such as physical exhaustion and dehydration may increase the risk of neuroleptic malignant syndrome." Lazarus, p. 1229. In a related context before this Court, a member of the Coalition noted the increased risk of side effects from antipsychotic drugs caused by stress: See New Jersey Public Advocate, DMHA brief *amicus curiae* in *Ake v. Oklahoma* 470 U.S. 92, 105 S.Ct. 1067 (1985), p. 52, n.41, regarding stress of trial as affecting reaction to drugs, citing *inter alia* Cameron and Wisner, *An Anticholinergic Toxicity Reaction to Chlorpromazine Activated by Psychological Stress*, 167 *J. of Nerv. and Ment. Dis.* 508 (1979); Hartley, Couper-Smartt and Henry, *Behavioral Antagonism Between Chlorpromazine and Noise in Man*, 55 *Psychopharm.* 97 (1977); and, regarding the high stress levels associated with being convicted and sentenced for a crime, Goldberg and Breznitz, eds., *Handbook of Stress: Theoretical and Clinical Aspects* at 340-45 (Free Press, 1983).

¹⁰ To add insult to real injury, like a typical institutional defendant in a "right to refuse" case, the state claims that Mr. Perry's apparent side effects are the result of his "faking". See Brief in Opp. Cert., p. 5 ("... Perry may pretend to suffer from some lesser side effects, such as drooling and impairment of his movement.") Compare *Rennie v. Klein*, 462 *F. Supp.* 1131, at 1140 (D.N.J. 1979).

22-23. Quite apart from these observable physical problems, there are also serious questions about some of the more subtle mental effects of the forced drugging on Mr. Perry. See Appendix pp. 94-95, 100, 123. See, also Gutheil and Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence" and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 Hofstra L. Rev. 77, at 110, 119 (1983)

2. The Imbalance Between The State's Interest In "Treatment" And The Prisoner's Rights In This Case.

In this Court's recent opinion on forced drugging of prisoners, *Harper v. Washington*, there occurred a "balancing" of the prisoner's liberty interest as against the state's interest in combating the danger posed to himself and others by a violent, mentally ill inmate under the "reasonable relation" test of *Turner v. Safley*, 483 U.S. 78, 107 S.Ct. 2254, 96 L. Ed. 2d 282 (1987). See *Harper*, 110 S.Ct. at 1037-1039.

We confront here the State's obligations, not just its interests. The State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interest, but also with the needs of the institution. Prison administrators have not only an interest in insuring the safety of prisons' staff and administrative personnel but the duty to take reasonable measures for the prisoners' own safety.... Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with *medical treatment* for his illness. ... The drugs may be administered for no purpose other than *treatment*, and only under the direction of a licensed psychiatrist.

110 S.Ct. at 1039 (emphasis added).

And, finally we hold, that, given the requirements of the prison environment, the Due Process Clause permits the State to *treat* a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the *treatment* is in the inmate's interest. 110 S.Ct. at 1039-40 (emphasis added).

In *Harper*, clearly the phrases "to treat", "medical treatment" and "treatment" apply to the long term forced drugging of the prisoner there, who was serving a prison term *rather than* facing a death penalty as Mr. Perry is here. Similarly, in virtually every other "right to refuse" case involving pre-trial detainees or convicted prisoners, there has been a similar implicit understanding that "treatment" meant long term drugging: See, for example, these comments from the polar opposite opinions in *Charters v. United States*, 863 F.2d 302 (4th Cir. 1988) *en banc*, cert. den., March 5, 1990 (58 U.S.L.W. 3565 Mar. 6, 1990) (no. 88-6525) and *Bee v. Greaves*, 744 F.2d 1387 (1984), cert. den. 469 U.S. 1214 105 S.Ct. 1187 (1985):

Finally, to be weighed in the balance is the governmental interest at stake, and the administrative and fiscal burdens that would be imposed by Charter's proposed regime. It has to be recalled that the government's role here is not of punitive custodian of a fully competent inmate, but *benign custodian* of one committed to it *for medical care and treatment*. In this relation, the government is under a specific statutory duty to attempt to restore mental competency so that the patient may be returned to the free society. ... (I)t seems clear that under Charter's proposed regime any manifestation of objection to medication by a patient would effectively stymie the government's ability to proceed with the *treatment*. *Charters*, 863 F.2d at 312 (emphasis added)

Compare the above with the following analysis from *Bee v. Greaves* in answer to the state's argued interest in "treating" the inmate by forced drugging with antipsychotics:

The first interest asserted is not a legitimate state concern in this case. True, the jail is under a constitutional duty to *treat* the medical need of pretrial detainees and such treatment includes mental as well as physical disorders. The premise underlying this duty is that the state may not deliberately fail to provide medical treatment *when it is desired by the detainee*. Medical treatment is designed to ensure that the conditions of pretrial detention do not amount to the imposition of punishment. This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the risks and pains of potentially dangerous treatment, the jail may force him to accept it ...

... (A)lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotropic drugs ... Generally speaking, a decision to administer antipsychotropic drugs should be based on the legitimate treatment needs of the individual in accordance with accepted medical practices. A State interest unrelated to the well being of the individual or those around him has no relevance to such a determination. The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotropic drugs is concerned. *Bee v. Greaves*, 744 F 2d at 1395. (emphasis in original) See also, *Large v. Superior*, 714 P. 2d 399 (Arizona 1986).

Large, in particular, confirms the "for treatment only" justification for drugging prisoners.

We hold, therefore, that the forced, non-emergency administration of psychotropic drugs which present serious dangers of significant side effects is not justified by security considerations alone. Ordinarily "security" and discipline may be insured by more conventional methods such as incarceration or isolation. Thus, forcible medication with dangerous drugs should be limited to specific emergencies under procedural safeguards. *Large*, 714 P 2d above at 408.

Admittedly, after *Harper's* comments about the use of seclusion or restraints, the threshold for prison forced drugging may have shifted somewhat towards the interests of the prison in security and safety. . See *Harper*, above at 1039, n. 10. However, like *Large*, *Bee*, and even *Charters*, the Washington prison policy in *Harper* initially turned on two factors: "whether the inmate suffers from a "mental disorder"; and second, whether, as a result of that disorder, he is dangerous to himself, others or property." *Harper*, 110 S.Ct. above at 1042.

Similarly, two of the other cases principally relied upon here by the State of Louisiana, are grounded in the "dangerous" rationale rather than purely institutional needs. See, e.g., *Dautremont v. Broadlawns Hosp.*, 827 F 2d 291, at 298 (8th Cir. 1987) ("Clearly, the record shows that Dautremont was both a

danger to himself and to others and the administration of medication against his will was justified.") and *Lappe v. Loeffelholz*, 815 F.2d 1173, at 1174 (8th Cir. 1987): ("Lappe was an inmate at the Iowa State Penitentiary. In November, 1982 he was transferred to another cell because he had been disruptive.") Again, however, in this case there was *no* showing of finding that Mr. Perry required forcible drugging on *any* basis other than the State's interest in attempting to make him competent for execution.

Clearly, under both of these disparate approaches, "medically accepted"¹¹ treatment¹² is more than whatever is "accepted" in the eye of the beholder. Whatever it is, what it is *not* is mere "processing" for trial, or incarceration *a fortiori*, it is also

¹¹ Establishing what is "medically accepted" treatment in the setting of death row may itself be problematic. As Petitioner has already noted (Petition, p. 26, n. 13) both the American Medical Association and the American Psychiatric Association -- as well as doctors involved here -- have expressed reservation about any medical and psychiatric involvement in execution. For a recent discussion of this issue, See Ward, "Competency for Execution: Problems in the Law and Psychiatry", 14 *Fla. St. Univ. L. Rev.* 35, 90 (1986) citing Appelbaum, "Psychiatrists' Role in the Death Penalty", 32 *Hosp. & Community Psych.* 761 (1981). Ward specifically deals with the "right to refuse" on death row as well. See 14 *Fla. St. Univ. L. Rev.* at 95-99.

¹² There follows a review of the definitions for "treatment" in the medical dictionaries available on the shelves of a highly rated medical school library in Philadelphia:

"An action or program of action directed to the care of a patient for the restoration of health or the improvement of health or the improvement or stabilization of function. Such measures usually prescribed by a medical practitioner, are designed most often to counteract disease or stimulate healing." *Churchill's Medical Dictionary*, p. 1980 (1986).

"(T)he management and care of a patient for the purpose of combatting disease or disorder." *Dorland's Medical Dictionary*, p. 1746 (27th Ed. 1988).

"The course of action adopted to deal with illness, and the control of the patient." *Blaketon's Gould Medical Dictionary*, p. 1740 (4th Ed. 1979).

Clearly, none of these standard definitions of "treatment" seems to countenance drugging in this context where the real goal is not health but death. As a leading law review comment pointedly noted:

"With *Ford*, the Court approves an arrangement in which psychiatrists clear the tortured minds of capital prisoners so that the state can fill their bodies with electricity." *The Supreme Court, 1985 Term-Leading Cases*, 100 *Harv. L. Rev.* 100, 107 (1986)

not simply preparation for a rendezvous with the electric chair.

And equally clearly, the misuse of these psychotropic drugs for purposes other than "treatment" has been a consistent problem in both the civil and criminal contexts. See, e.g., *Jones v. U.S.*, 463 U.S. 387, 103 S.Ct. 3043, 3061 (1983) (Brennan, J. dissenting):

Administration of psychotropic medication to control behavior is common. Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. See *Mills v. Rogers*, 457 U.S. 291, 303, 102 S.Ct. 2442, 2450, 73 L. Ed. 2d 16 (1982); *Rennie v. Klein*, 653 F.2d 836, 845 (3rd Cir. 1981) *en banc*.

The blandness of words such as "administration" and "given" completely belies the reality of forced drugging: the physical restraints, the grappling for a demeaning position, the torn clothes, the pain of the shot and its after effects, in short, the complete violations of one's dignity and autonomy:

According to appellant's hospital records, she "cooperated [with the] injection although it needed a show of force (5 staff members)." Appellant's declaration states that she was held down by several men who pulled down her underwear and injected her in the buttocks. *Riese*, 243 Cal. Rptr., above at 244 n. 3. See also, *Harper*, 110 S.Ct. at 1046 n. 4 (Stevens, J. dissenting) (regarding Harper's reactions to Haldol)

Thus, given the setting, the purpose and the lack of any real, long term medical purpose, the forced drugging of a death row inmate is more of a "control" for institutional needs than for any real medical "treatment" to benefit the inmate.

In the most recent opinion on these very same issues, *U.S. v. Watson*, 893 F.2d 870 (8th Cir. 1990), the Eighth Circuit Court of Appeals held as follows:

The government argues that it is justified in forcibly medicating Holmes because the Medical Center psychologist stated that she could not recommend his release from prison unless she could treat him with psychotropic medications. We do not believe *the need to prepare Holmes for release* outweighs his right to refuse medication. ... We simply hold that if Holmes is presently functioning adequately in the prison setting and does not present a danger to himself, other inmates or prison staff, the government may not forcibly administer antipsychotropic medication. 893 F 2d at 981-2 (emphasis added)¹³

Here there is not even the barest of assertions that Mr. Perry "needs" "treatment" from the perspective of either his danger to himself or others. See Appendix A to the Brief in Opp. Cert. at p 167.

The State's reasoning that Haldol is not being well used as a punishment in violation of the Eighth Amendment is transparently circular: "The medication is not given to the petitioner because he brutally murdered five members of his family, but is given to assist the inmate in maintaining competency." Brief in Opp. Cert. at p. iv. The missing final clause is clearly "so that he may be executed for his crimes." If execution is the only justification for the forced drugging, it fails the balancing required by *Harper, Bee, Watson*, and even *Charters*.

In short, the application of the *Harper* balancing test in this context puts Mr. Perry in the same position as Mr. Holmes in *Watson* and Mr. Bee: Once past the issue of dangerousness to himself or others, the state's interest in punishing him to the ultimate cannot by itself alone offset his "right to refuse". Mr. Perry may have had to be competent to be tried because of the state's interest in accomplishing its goal of determining whether he could be released "into the free society" as described in *Charters*, above. However, that determination being made, Mr. Perry in effect "reverts" back to the same status as a person under civil commitment for the purpose of his continuing to retain a "right to refuse". He must behave in such a way as to endanger himself, the prisoners or staff to justify being forcibly

¹³ The *Watson* panel was obviously aware of the pending petition in *Harper*. See *Watson*, 893 F 2d 893 above at 977, n.12.

"treated".¹⁴ Competence for execution or any other purely institutional need cannot balance against the very real risks of these unwanted drugs.

At no time did the trial court's hearing on Mr. Perry's competence rise to the level of due process approved by this Court in *Harper*. In fact, the trial court's "hearings" were tainted by both the *ex parte* hospital records and reports and the judge's interim order on August 26, 1988 unilaterally authorizing forcible drugging. See Petition, pp 5-6.

Rather than providing procedural protections on the question of forced drugging *vel non*, the hearings merely focused on the terminal issue of Mr. Perry's competency to be executed. *Harper* -- and even *Charters* -- would both seem to require more process involving the sanity commission's recommendations *ab initio* than occurred here. Under the *Harper* standard, only a review by a panel of prison physicians and other professionals not currently involved in the inmate's case could provide the necessary review. See *Harper*, 110 S.Ct. at 1040. Under *Charters*, the minimum review required seems to be only a review by a competent and appropriate professional. See *Charters*, 863 F 2d above, at 313. Here -- because of the trial court's segregation of the drug refusal issue from the process of review of competency for execution -- it is difficult to identify when and where the actual review of Mr. Perry's challenge of his forced drugging can even be said to have been considered by any single psychiatric professional. What appears from the record, then, is an *ad hoc*, review *in camera* of the drugging issue by a single judge tainted by dubious and unchallenged outside information. Under *Harper* -- and *Charters* -- that irregular process is insufficient to satisfy Mr. Perry's Fourteenth Amendment rights.¹⁵ The resulting forced drugging then violates his Eighth Amendment rights by exposing him to pain and suffering from drug side effects unrelated to any legitimate treatment objective.

¹⁴ See, on this issue, the Petition, p. 11. La.R.S. 15: 830.1 seems to parallel precisely the reasoning in *Bee v. Greaves*, above and, more recently, in *U.S. v. Watson*, above, regarding the standard for overcoming the prisoner's right to refuse.

¹⁵ Another standard, of course, is provided by Louisiana law, which may, of course, provide additional guarantees beyond federal constitutional guarantees. See *Mills v. Rogers*, 457 U.S. above at 300-302. While the relevant statutes do not specifically apply to the setting of a death row inmate, they clearly do provide the best available model for what process is due here. See Petition, pp. 10, 11 and 19.

C. THIS COURT'S MANDATE IN *FORD V. WAINWRIGHT* PROHIBITS THE EXECUTION OF A PERSON WHOSE SANITY FLUCTUATES FROM MOMENT TO MOMENT.

1. Factual Underpinnings

The ruling by the court below that Petitioner is sane, and therefore competent to be executed, was made despite significant factual evidence that Petitioner's mental state was in a constant state of flux. The record is replete with testimony by psychiatrists, who were well aware of Petitioner's mental illness, that Petitioner's mental state was not a constant. Indeed, one of Petitioner's psychiatrists described him as a "moving target." See Appendix at 79-80 (Testimony of Dr. Cox).

Indeed as Petitioner's doctors explained, Petitioner's wavering mental state was indicative of his mental illness. Petitioner was uniformly diagnosed as having schizo-affective disorder. As reflected by the expert testimony in the court below, schizo-affective disorder cannot be cured, "sometimes it will be worse or sometimes it will be better but it's going to be there." Appendix at 79 (Testimony of Dr. Cox). Thus, according to his psychiatrist, Petitioner's "competency changes frequently and he's not in the same place all the time ... (S)ometimes he's competent and sometimes he's not" Appendix at 80 (Testimony of Dr. Cox). See also Appendix at 82-83 (Testimony of Dr. Cox); Appendix at 151-54 (medical records indicating rapid changes in Petitioner's condition).

Petitioner's case is not unusual. Many psychotic disorders cannot be miraculously "cured" and many individuals with such disorders, like Petitioner, will have mental states which vary with great frequency. Manifestations of schizophrenia, for example, "are present one day and not the next. They are revealed to one examiner and not to another ..." L. Bellak and L. Loeb, *THE SCHIZOPHRENIC SYNDROME* at 337-38 (1969) (quoted in Enzinna and Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency To Be Executed After Ford v. Wainwright*, 41 Fla. L. Rev. 115, 142 n.70 (1989) (hereinafter cited as "*Capital Punishment and the Incompetent*"). Thus, "fluctuations in mental state ... can occur when an individual is genuinely psychotic ..." Heilbrun

and McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 Bull. Am. Acad. Psychiatry and Law 205, 210 (1988) (hereinafter cited as "Assessment of Competency for Execution?").

Thus, this case presents one of the primary questions which was not expressly answered in *Ford v. Wainwright*, 477 U.S. 399 (1986) -- what is the substantive meaning of "insanity" to stay an execution.¹⁶ *Amicus* contends that the Eighth and Fourteenth Amendments require, at a minimum, that the definition of insanity must be broad enough to encompass individuals whose mental state wavers constantly. To hold otherwise would permit states to engage in ghoulish "sanity watches" in order to ensure that the execution is carried out during a lucid interval.

2. *Ford* and the Meaning of Insanity

As discussed *supra*, a majority of this Court held that the Eighth Amendment, as applied to the states via the Fourteenth Amendment, prohibits a state from executing an individual who, after conviction of a capital crime, becomes "insane." 477 U.S. 399, 410 (plurality) and 418 (Powell, J., concurring). The plurality's opinion did not advance a concrete

¹⁶ "Insanity" is, of course, a purely legal term which has been given different meanings in different stages of the criminal process. For example, the "insanity defense" precludes a person from being found guilty of a crime if, at the time of his offense, he was insane. In this context, the majority of jurisdictions have adopted the "M'Naghten" rule which will exculpate a person from criminal liability if, at the time of the offense the defendant lacked the capacity to understanding the nature and quality of the offense or, if he did have such an understanding, he did not comprehend that what he was doing was wrong. Additionally, some jurisdictions have adopted an "irresistible impulse" test which requires a verdict of not guilty by reason of insanity if the defendant has a mental disease which kept him from controlling his conduct. See Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. Rev. 37, 42-44 (1989); Note, "Ford v. Wainwright, Statutory Changes and a New Test for Sanity: You Can't Execute Me, I'm Crazy!", 35 Clev. St. L. Rev. 515, 532 (1987).

Additionally, this Court had recognized that if the defendant is insane at the time of criminal proceedings, he must be committed to a mental hospital until he is mentally fit to stand trial. *Dusky v. United States*, 362 U.S. 402 (1960). In *Dusky*, the Court held that the test for competence to stand trial "must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402 (quotation omitted).

definition of insanity nor propose a set of substantive guidelines to shape the state's inquiry into sanity.¹⁷

Justice Powell, concurring in the judgment, was the sole member of the Court to attempt to imbue the term insanity with some substantive meaning. *Id.* at 419. Justice Powell opined that sanity to go forward with execution means that the defendant must perceive the connection between his crime and his punishment, and must be aware of his impending death. *Id.* at 422. See *State v. Martin*, 515 So. 2d 189, 190 (Fla. 1987) (*per curiam*) (applying the test enunciated by Justice Powell and concluding that person was competent to be executed despite the fact that he believed a satanic conspiracy resulted in his conviction).

3. Evolution of the Ford Standard in *Penry*

In *Penry v. Lynaugh*, U.S. , 109 S. Ct. 2934 (1989), this court declined to prohibit absolutely the execution of individuals with mental retardation. 109 S. Ct. at 2953-55. However, the *Penry* decision neither explicitly nor implicitly undercut the holding of *Ford*.

The evidence in the *Penry* case indicated that the defendant's IQ reflected borderline retardation and that he was capable of functioning as a 9 or 10 year old. *Id.* at 2941. The defendant contended that the Eighth and Fourteenth Amendments categorically prohibited states from executing persons with mental retardation. The Court did not accept this argument, but stressed that executions of persons who are profoundly or severely retarded would probably violate the Eighth Amendment:

¹⁷ As Justice Marshall observed in *Ford*, no state permits the execution of persons who are insane. 477 U.S. at 408. However, the states fail to provide a uniform definition of insanity. Indeed, most states contain no explicit definition at all. See, Ewing, Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives, 5 *Behavioral Sciences & Law* 175, 178 (1987) (describing various standards (or lack of standards) in states); Heilbrun, The Assessment of Competency for Execution: An Overview, 5 *Behavioral Sci. & Law* 383, 388-91 (1987) (citing statutes, cases identifying state standards to be used); Note, *Insanity of the Condemned*, 533, 540-41 (1979) (same). The failure of the states to arrive at a consensus as to the boundaries of "insanity" for purposes of execution, does not foreclose this Court from doing so. See *Stanford v. Kentucky*, U.S. , 109 S. Ct 2969, 2981 (1989) (O'Connor, J. concurring). It has been determined that the Constitution prohibits the execution of an individual who is insane. It is the role of this Court to provide some meaning to that rule.

The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking in the capacity to appreciate their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment ... Moreover, under *Ford v. Wainwright*, ... someone who is "unaware of the punishment they are about to suffer and why they are to suffer it" cannot be executed. *Id.* at 2954 (emphasis added).

Thus, in *Jica*, this Court appeared to adopt Justice Powell's definition of insanity. *Amicus* contends that this standard is wholly inadequate. Moreover, even if this is the appropriate standard, *Amicus* asserts that an individual whose sanity is in a state of flux cannot be deemed competent to be executed. Indeed, it is noteworthy that *Penry* did not -- and could not given the static nature of mental retardation -- involve a situation in which the only constant in an individual's mental state is its very lack of constancy.

4. Problems With The Standard of Insanity Put Forward By Justice Powell.

Professors Hazard and Louisell have noted that "(t)he meager authority indicates that the common law test of insanity is whether the defendant is aware of the fact that he has been convicted and that he is to be executed." Hazard and Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 394 (hereinafter cited as *Death, the State, and the Insane*) (citing, *inter alia*, *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955)). Accord Case Note, *Eighth Amendment -- The Constitutional Rights of the Insane on Death Row*, 77 J. Crim. L. & Criminology 844, 863 (hereinafter cited as "*The Constitutional Rights of the Insane on Death Row*").¹⁸ It would appear that this test was based --

¹⁸ This is not the sole common law definition. For example, in *Bingham v. State*, 82 Okla. Crim. 305, 169 P.2d 311, 314 (Okla. Crim. App. 1946), the court wrote that "insanity that will preclude execution means a state of general insanity, the mental powers being wholly obliterated, and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed."

without much thought -- on the standard used to assess insanity at the time of trial. *Death, the State, and the Insane*, 9 UCLA L. Rev. at 394. This standard has obvious similarities to that advanced by Justice Powell in his concurrence in *Ford*.

Notably, the standard adopted by the Florida statute which was deemed procedurally invalid in *Ford* labelled a convict insane if he lacked the "mental capacity to understand the nature of the death penalty and the reason why it was imposed on him." Fla. Stat. § 922.07. Similarly, the Louisiana standard led the court below to find that the petitioner is "mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment." Appendix at 62 (Order of 19th Judicial District Court, Parish of Baton Rouge). These standards are quite similar to the general common law standard identified above and the test set forth by Justice Powell.

However, there are serious problems with using this standard. Commentators have suggested that the phrase "nature of the penalty" presents problems because society has reached no agreement on what that phrase, in its broadest sense, means. Radelet and Barnard, *Ethics and the Psychiatric Determination of Competency To Be Executed*, 14 Bull. Am. Acad. Psychiatry & Law 37, 42 (1986) (hereinafter cited as "*Ethics and the Psychiatric Determination of Competency To Be Executed*").

Moreover, the term "understand" poses even more significant problems. Two commentators have written:

As a lower limit, the prisoner should possess a mental ability greater even than mere cognitive understanding of his or her fate. If what is meant by "understand" is mere cognitive understanding, that is, a bare mental understanding of the fact of execution and that it will result in death, then almost all mentally ill prisoners will be found competent. A superficial factual understanding rarely is impossible for a mentally ill person. Cf. American Psychiatric Ass'n., *Diagnostic & Statistical Manual of Mental Disorders* 191 (3d ed. 1980) ... (paranoid schizophrenics may exhibit no functional impairment and often can interact with others). What is more unusual is an impairment of of the individual's affective understanding. An individual lacking affective understanding of his impending execution could accurately describe what an execution means,

but would exhibit no emotional reaction to the knowledge that he faces execution. *Capital Punishment and the Incompetent*, 41 Fla. L. Rev. at 118 n.14.

Moreover, application of this vague standard presents many difficulties to individual mental health professionals. Indeed, the *Ford* case and that herein, provides prime examples of the difficulties of implementing these types of standards:

The state psychiatrists who interviewed Alvin Ford illustrate this problem. One of them, Dr. Mhatre, found that Ford exhibited an "ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appear(ed) to understand what [was] happening around him." Petition for Writ of Certiorari at 39, *Ford v. Wainwright*, 477 U.S. 399 (1986) (No. 85-5542). As Ford's counsel indicated, this finding fails to support the doctor's conclusion that Ford understood that he might be executed. *id.* at 39 n.29. A deluded person such as Ford, who believed that he would not be executed because he had won a "landmark case" outlawing capital punishment, see *Ford*, 477 U.S. at 403 (plurality opinion), often can operate normally on a daily basis. See DSM III, *supra*, at 191 (impairment in functioning may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is relatively rare"). Mhatre's conclusion indicates that he understood the standard to be "does the prisoner understand anything" rather than "does the prisoner have the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him?"

Id.

Similarly, in this case, the court below concluded that petitioner was competent to be executed despite the fact that petitioner's psychiatrist, after numerous meetings with him, concluded that his mental state fluctuated often and rapidly. The court below relied upon the testimony of psychiatrists that, during interviews with petitioner, petitioner gave the "correct" answers to the necessary questions. For example, Dr. Jiminez concluded that petitioner understood the reasons why he had been sentenced to death because he admitted that he had killed his family members. Appendix at 73-74. However, during the

exact same conversation, petitioner denied that he had killed his family. Simply giving the "right" answers to a few key questions once, in the context of many assessments and trial testimony which revealed that petitioner had no real understanding of what he had done or the nature of the death penalty, resulted in a finding of competence to be executed.¹⁹

5. Post-Ford Interpretations: Guilty But Mentally Ill

Twelve states have adopted pleas and verdicts of "guilty but mentally ill." Emanuel, *Guilty But Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C. L. Rev. 37 (1989). These statutes provide that a defendant who is found guilty but mentally ill may receive any legally permitted sentence which a person who is not mentally ill can receive, including the death penalty. *Id.* at 38. Evidently, the purpose of these statutes is to curtail the use of the insanity defense which requires the jury to find an individual who is insane not guilty. Such persons are then committed to a mental institution until they recover their sanity. *Id.* at 39.

¹⁹ As stressed above, there are numerous instances in which an individual might seem "sane," but such appearances are deceiving. In this context, one author has stressed:

Experts have shown that death row confinement can have debilitating psychiatric and psychological effects on inmates. Recent evidence also suggests that many death row inmates are significantly impaired individuals, suffering from recent or unrecognized psychiatric, neurological, and cognitive disorders.

[A] recent study on mental status of death row inmates ... found, strikingly, that every inmate studied was suffering from some type of physiologic or psychiatric disorder ... The article emphasizes that none of the subjects were obviously schizophrenic and that it required long interviews, hospital record reviews, psychological assessments, and interviews with relatives to appreciate the nature and extent of the subjects' mental illness. The authors noted that the subjects, with one exception, attempted to minimize their psychiatric disorders, preferring to appear "bad" rather than "crazy." Note, *Ford v. Wainwright: A Coda in the Executioner's Song*, 72 Iowa L. Rev. 1461, 1478, 1479-80 (1987) (footnotes omitted).

Because of this reluctance of inmates to be stigmatized as mentally ill, there seems to be little risk that the Court will stimulate a flood of insanity claims by establishing a more meaningful standard for competency to be executed.

The highest courts of a few states have held that defendants who are found guilty but mentally ill do not fall automatically within the *Ford* prohibition on the execution of persons who are insane. See *People v. Crews*, 122 Ill. 2d 266, 522 N.E.2d 1167, 1174 (Ill. 1988); *State v. Rice*, 110 Wash. 2d 577, 757 P.2d 889, 913 (Wash. 1988) (*en banc*); *Harris v. State*, 499 N.E.2d 723, 727 (1986). These courts seem to indicate that one who is "mentally ill" is not "insane." Indeed, in *State v. Rice*, the Washington Supreme Court noted that "courts in other jurisdictions have uniformly refused to extend the prohibition against executing insane persons to those whose illness does not reach the level of insanity." 757 P.2d at 913 (collecting cases). Cf. *Lowenfeld v. Butler*, 843 F.2d 183, 188 (5th Cir. 1988) (refusing to require insanity hearing prior to execution despite affidavit of psychiatrist that defendant is a person with paranoid schizophrenia whose capacity to understand the death penalty would be impaired).

These cases indicate the inherent weakness of the courts' and common law's definitions of insanity. These definitions are wholly devoid of medical content. Thus, a defendant may be extremely disturbed, yet not be "insane."

6. A Standard for Insanity to Stay Execution

Two professors have stressed the need to develop a coherent definition for competency to be executed. In *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 Bull. Am. Acad. Psychiatry & Law at 45-47, Professors Radelet and Barnard stress that the "vagueness" and "lack of clarity" of the standard used in Florida raises significant ethical issues for psychiatrists asked to evaluate a prisoner's competency to be executed. See also Heilbrun and McClaren, *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 Bull. Am. Acad. Psychiatry & Law 205, 206-08 (1988) (evaluating ethical questions involved in determining whether to participate in assessment of competency for execution); Wallace, *Incompetency For Execution: The Supreme Court Challenges the Ethical Standards of the Mental Health Professionals*, 8 J. of Legal Medicine 265, 269-71 (1987) (indicating that it is probably unethical for psychologists and psychiatrists to evaluate a person's competency for execution

since such evaluation may enable the state to take a life); Ewing, *Diagnosing and Treating "Insanity" On Death Row: Legal and Ethical Perspectives*, 5 Behavioral Sciences & Law 175, 181-82 (1987) (same); Note, *Medical Ethics and Competency To Be Executed*, 96 Yale L. J. 167, 176-77 (1986) (evaluating ethical problems in assessing competence for execution).

Despite the lack of explicit guidance from the Court in *Ford*, a definition of insanity might be derived from examining the purposes of the prohibition on the execution of individuals who are insane. As several commentators have observed, it is helpful to examine the bases for the ban on executing persons who are insane in order to develop a contextual meaning of insanity. See *Death, the State, and the Insane*, 9 UCLA L. Rev. at 395; *The Constitutional Rights of the Insane on Death Row*, 77 J. Crim. L. & Criminology at 864.

In *Ford*, the plurality advanced various reasons for the common law and modern statutory prohibitions on the execution of individuals who are insane. 477 U.S. at 407-08. These reasons, if examined carefully, help to define the parameters of the meaning of competence to be executed. The reasons advanced in the plurality's opinion indicate, at the very least, that a person who drifts in and out of sanity and who occasionally gives the "right" answers to a few questions, is not competent to be executed.

The plurality noted that an individual who is insane cannot make his or her peace with his conscience or diety. *Id.* at 409. A person whose sanity fluctuates cannot truly accomplish this worthy goal. Similarly, if the purpose of the prohibition on execution of the insane is intended "to protect the condemned from fear and pain without comfort of understanding," *id.* at 410, the definition of insanity cannot include someone whose sanity varies. Likewise, the retributive value of executing someone whose sanity is not constant for a certain period of time is low indeed since such a person will not truly comprehend the severity of his crime and the reasons for his impending punishment. Similarly, Justice Powell's concurrence indicates that sanity means more than a passing comprehension. See *id.* at 425 n.5 (execution is stayed until a defendant is "cured" of his

disease).²⁰

To permit a defendant to be executed when he does not have the type of permanent comprehension of his crime and punishment will serve no purpose whatsoever. Such a malleable definition of sanity would swallow the rule against execution of persons who are insane. States would simply be allowed to wait for a "good day" or even a lucid moment and, if the defendant can be strapped to the electric chair quickly enough, the execution can take place. This, of course, would make a mockery of the Court's decision in *Ford* and the common law rule against executions of persons who are insane.

This Court must, at the very least, set a minimum standard of competence to be executed by holding that the execution of persons, like Petitioner, whose mental state varies "like a moving target," violates the Eighth and Fourteenth Amendments.²¹

²⁰ Commentators have stressed the importance of a thorough long-term investigation of the defendant's competence for execution. See *Capital Punishment and the Incompetent*, 41 Fla. L. Rev. at 140-42; *Assessment of Competency for Execution?*, 16 Bull. Am. Acad. Psychiatry & Law at 208-13.

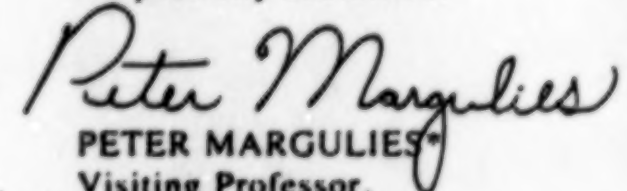
These arguments indicate that a quick review of the individual and the individual's answers to a few, isolated questions cannot serve as a sufficient basis upon which to deem a person competent to be executed.

²¹ Cf. *Death, the State, and the Insane*, 9 UCLA L. Rev. at 395 (Professors Hazard and Louisell persuasively argue that the standard of competence for execution should be equated with the general standard used to commit persons involuntarily to an institution).

IV. CONCLUSION

On the basis of the foregoing and for the reasons stated above, *amicus curiae* respectfully requests that this Court reverse the decision below, so as to prohibit the forced drugging of the petitioner for purposes of execution and prohibit the execution of the petitioner while insane under its holding in *Ford v. Wainwright*.

Respectfully submitted,


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